# TRANSCRIPT OF RECORD.

(IN TWELVE VOLUMES)

IN THE

# Supreme Court of the United States

October Term, 1925.

No. 512

UNITED STATES OF AMERICA,

*Appellant,*

v.

THE CHEMICAL FOUNDATION, INCORPORATED,

*Appellee.*

## Volume II.

## TESTIMONY.

(Pages 501 to 1000 inclusive.)

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE DISTRICT OF DELAWARE.

No. 502.

IN EQUITY.

UNITED STATES OF AMERICA,
*Plaintiff,*

*v.*

THE CHEMICAL FOUNDATION, INCORPORATED,
*Defendant.*

Wilmington, Delaware,
June 4, 1923, at 9 o'clock A. M.

*Before:*

HON. HUGH M. MORRIS, U. S. District Judge.

*Present:*

Henry W. Anderson, Esq.,
Herman J. Galloway, Esq.,
William W. Wilson, Esq.,
William M. Offley, Esq.,
Thomas E. Rhodes, Esq.,
Spier Whittaker, Esq.,
James J. Lenihan, Esq.,
James H. Hughes, Jr., Esq.,
Of Counsel for Plaintiff.
William D. Guthrie, Esq.,
Isidor J. Kresel, Esq.,
Bernard Hershkopf, Esq.,
(Of Guthrie, Jerome, Rand & Kresel)
Lucien H. Boggs, Esq.,
William G. Mahaffy, Esq.,
Of Counsel for Defendant.

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## PROCEEDINGS AT TRIAL IN OPEN COURT.

MR. GALLOWAY: If the Court please, we wish to call to the attention of your Honor at this time the Plaintiff's motion to amend the Bill of Complaint, which motion was filed some time ago. The motion is, very briefly stated, a motion to amend by striking out the following allegation in the Bill:

> "to confirm and validate the orders aforesaid or pretended orders of Frank L. Polk and any actions taken by the Alien Property Custodian thereunder."

MR. KRESEL: What page is this, Mr. Galloway?

MR. GALLOWAY: This is page 40, beginning on line 5, of page 40, Mr. Kresel, and reading:

> "to confirm and validate the orders aforesaid or pretended orders of Frank L. Polk and any actions taken by the Alien Property Custodian thereunder."

To strike out the part which I have just read, your Honor, and also beginning with the word "sought" line 27 on page 40 and ending with the word "order" on line 28 of page 40, which is as follows:

> "sought to be confirmed and validated or authorized by said Executive order."

Also to strike out beginning with the word "sought" in line 9 of page 41 of the Bill of Complaint, and ending with the word "order" on line 11 of page 41, which portion reads as follows:

> "sought to be confirmed, validated and authorized by said Executive order."

If the Court please, we feel that that is merely a construction of a legal document, and we feel that

the allegation we have made is not material, and in addition we feel after careful consideration that the amendment which we request will state the true facts; and we do not feel that it prejudices the right of the defendant in any way in the preparation for this trial if we were entitled to an order granting the same.

MR. GUTHRIE: We do not object, except that we do not acquiesce in the suggestion that it is immaterial, but say that it is material to a construction of the action of the President, which we rely upon. Plainly and clearly the effect of the President's action, with the allegations put in the Bill, by inadvertence—we are not here to object to its being stricken out, but we are not here to acquiesce in the suggestion that it is immaterial:

THE COURT: As I understand you then, Mr. Guthrie, you have no objection to the amendment, but you do not desire to be estopped from insisting that the Executive Order when placed in evidence in this case shall not be construed as they say in the paragraph of the Bill it should be construed?

MR. GUTHRIE: We want to be at liberty to say that the Government has heretofore construed the Order exactly as we have construed it.

THE COURT: The amendment is granted without prejudice to the right of either party to urge such construction with respect to the Order as they may be advised.

MR. GALLOWAY: If the Court please, I wish to add that the statement "immaterial" was intended to be immaterial so far as the Court is concerned, it is not binding on him, what construction the parties made in their pleading.

Would your Honor care to take up the motion at this time, the motion to strike out the portions of the

answer, and the motion to dismiss the Bill, and other motions contained in the Answer?

THE COURT: What is the desire of counsel for the Defendant in regard to those motions, that they be heard now or be heard at a late stage in the case?

MR. GUTHRIE: We understood at the prior session that your Honor intimated your preference that those motions should be taken up after the testimony had been adduced. We are, of course, ready to proceed with them now. We will be guided by whatever your Honor desires.

THE COURT: Shall we, without determining that matter, proceed in this order: Will counsel for the Government state the issues as they are now pleaded and the questions that will arise under the pleadings as they now stand, and then I will hear the counsel for the Defendant as to their views of the issues raised by the pleadings as they now stand, and we will then determine whether we will hear these motions now or after the testimony has been presented.

OPENING STATEMENT BY MR. ANDERSON.

MR. ANDERSON: May it please the Court; In the statement of this case and the issues which are presented by the pleadings and the positions for which the Government will contend, I shall ask the indulgence of the Court, while I make the statement somewhat more elaborate than is probably usual in such cases, because of the character of the case and the confusing nature of these various Statutes, Executive Orders, Regulations, and so forth, which surround the facts pleaded, and under which those facts are to be considered.

In addition to that consideration, it is the desire of the Government that its position at the outset shall be very clearly understood by Court and counsel, and

that the fullest exposition of any facts bearing directly or indirectly upon this matter, should be presented to the Court in this trial, because we feel, and it is the feeling of the department representing the Government, that in a case of this character, the Court should have all the facts available, and if there are any which we do not know of, we are prepared to produce them, to the end that justice may be done under the law. The high aim of the Government is, of course, the attainment of justice regardless of the issues in this case.

At the outset, I shall ask leave of the Court to state certain matters which are matters of common and historical knowledge, and of which the Court will take judicial notice; but the frame-work of the case is best presented by a review and brief statement of those statutes and treaties.

By Resolution of Congress of April 6, 1917, War was declared between Germany and the United States, or rather declared to be then in existence as a recognized status, resulting from the acts of the German Government. That Declaration was predicated upon a Message or Address by the President, which stated with a clearness and brilliancy, probably unequaled and certainly unsurpassed in the history of the United States, the ideals and the aspirations of the United States in the conduct of that great enterprise, and I think I am not overstating the facts when I say that that Address changed the whole status of the war before the world, and gave it a broader and deeper significance, and perhaps a higher and more idealistic significance, than had theretofore been realized.

The President, speaking for the people of the United States, and expressing their aspirations and ideals, with unusual felicity, declared that the people of this country entered upon this serious adventure with no selfish purpose, but with the greater and more

idealistic purpose of preserving peace, administering justice, maintaining right, and formulating and establishing a basis whereby the international relations of the world might be founded upon justice and right rather than upon force or selfish interests.

In response to that noble appeal, Congress passed the resolution of April 6, 1917, reciting the acts of the German Government, and declaring a state of war to be in existence.

That war was prosecuted for nearly two years —about eighteen months—and was brought to a successful issue by the United States in collaboration with other associated governments. An armistice agreement was entered into between the United States and Austria (between which countries war had subsequently been declared), on the 3rd day of November, 1918, and between the United States and Germany on the 11th day of November, 1918, by the terms of which agreements the military operations of the war were terminated, and certain adjustments pending negotiations for peace were made. Those negotiations were thereupon undertaken, which resulted, under the leadership of the President himself, so far as the United States was concerned, in three treaties, negotiated at Paris, one known as the Treaty of Versailles, between Germany and the Allied Associated Governments, signed on June 28, 1919; the Treaty of St. Germain, between Austria and the Allied Associated Governments, on September 10, 1919; and the Treaty of Trianon, between Hungary and the Associated Governments, on June 4, 1920.

These treaties, and especially the Treaty of Versailles, which is the chief one of these instruments here involved, were submitted to the Senate of the United States, as provided by the Constitution, but the Senate never advised or consented to the ratifi-

cation thereof, and they never became effective so far as the United States was concerned.

These conditions therefore continued until July 2, 1921, when the Congress of the United States passed a joint resolution, declaring a state of peace to have been restored or to exist. This resolution was finally contained in the United States Statutes, but I might state its terms briefly:

By the terms of that resolution, the United States Congress declared that a state of peace existed betwen the United States and Germany, but subject to the conditions that all of the provisions of the Treaty of Versailles in favor of the United States, should run to and accrue to the United States, and among other things, that all property of the German Government or of German citizens or Nationals, in the possession of the United States, or which had been seized or demanded by the United States, and had not been otherwise disposed of in accordance with the law, should be held until the German Government complied with the terms of that treaty, and, among other things, reimbursed citizens of the United States, and their Nationals, for any losses which had been sustained by the acts of the German Government before and during the war.

That, in a general way, was the substance of the treaty, so far as of immediate importance here.

In pursuance of that resolution, the treaties were negotiated—and similar resolutions were passed and treaties negotiated as to Austria and Hungary. The first was the Treaty of Berlin, of August 21, 1921, which became effective on November 11, 1921, which treaty followed substantially the terms of the resolution of July 2, 1921, in that it provided in effect, that peace, which was adjusted thereby, was conditioned upon the recognition by Germany of all the rights running to the United States under the Treaty

of Versailles, and also the agreement by Germany that any property of German Nationals, or of the German Government, which had been seized by the United States, or for which demands had been made by the United States during the progress of the war, should be held until and unless Germany reimbursed the Nationals of the United States for their losses, for which it was held to be liable under the terms of the Treaty of Versailles, and pay the claims of the Nationals of the United States. Germany also agreed to reimburse its own Nationals for private property of such Nationals seized during the war, and subject to said treaties.

The other treaties I need not bother with—Vienna and Budapest—they were substantially the same; and the real issue here is the question of Germany.

It will appear in this case that the German Government and the Austrian Government have never complied with the terms and provisions of those treaties, which were made conditions precedent to any surrender of property, or any obligation to surrender property of their Nationals held by the United States to await the compliance with the terms of those treaties. Upon that situation as well as the other provisions of the law, and the acts to which I will refer in a moment, or which were mentioned in the bill the contention of the Government is that the property of German Nationals which is involved in this case, as well as other property of German Nationals seized during the war, as I will point out in a moment, was primarily held by the United States for the benefit of the people of the United States, and especially for the benefit of those persons who have claims against the Imperial German Government, or its successors. It is therefore in that sense public property, with the power in Congress and the right in Congress to

return any of that property at any time it sees fit, to the German Nationals, by any legislation and subject to any condition that Congress may deem just, wise, or expedient.

As the matter then stood, therefore, in the treaty of August 21, 1921, effective of November 1, 1921, the United States held large amounts of German property, that is, property of German Nationals seized during the war, which, under the terms of seizure as I shall point out in a moment, was to be held for final disposition as might be directed by act of Congress, but by the terms of these treaties, the German Government, acting on behalf of its Nationals, and waiving all rights to that property, until at least it had complied with the terms and provisions of those treaties, with which it has never complied, agreed to reimburse its own Nationals if the property were taken under the terms of those treaties applied to the benefit of the Nationals of the United States.

That briefly is the essential legislation up to or covering in a broad way the situation which will be presented to the Court.

I shall now come to the conditions under which this property was seized, and mention briefly the terms of the so-called Trading with the Enemy Act. Of course I recognize that your Honor is familiar with much of this, but it will lead up to what I wish to say.

After war had been declared and had been in progress for some time, the Congress of the United States passed an act, October 6, 1917, which is commonly called the Trading with the Enemy Act. It was, as the Supreme Court has held, clearly a war measure enacted under the power of Congress to declare war, grant Letters of Marque and Reprisal, and make rules and regulations in respect to captures on land and sea. That act might be divided generally into two

general classes. One related to the prohibitions and limitations upon the trading with the enemy during the time of war, prohibiting, of course, any commercial intercourse between the Nationals of the two countries unless licenses were granted by the President for the carrying on of that business, he being authorized to grant such licenses.

The other general provision of the act, or branch of the act, related to the dealing with alien enemy property in the United States during the period of the war. It is with this second provision that this case has to deal. I shall call attention first to Section 5 of the act. After giving generally to the President certain powers, this section provides:

> "And the President may exercise any power or authority conferred by this act through such officer or officers as he shall direct."

I might hand the Court a copy of this act.

MR. KRESEL: The Court has a copy.

MR. ANDERSON: He has a copy. It is very kind of counsel for the defendant to print it in large type. Page 11 of the print by counsel, Section 5, provides:

> "And the President may exercise any power or authority conferred by this act through such officer or officers as he shall direct."

Then, Section 6 provides:

> "That the President is authorized to appoint, prescribe the duties of, and fix the salary (not to exceed $5000 per annum) of an official to be known as the alien property custodian, who shall be empowered to receive all money and property in the United States due or belonging to an enemy, or ally of enemy, which may be paid, conveyed, transferred, assigned, or delivered to said custodian under the provisions of this act; and to hold, administer, and account for the same under

the general direction of the President and as provided in this act."

Section 7 of the act provides for the seizure of or taking possession of alien property, requiring the same to be reported and delivered to the Alien Custodian, the terms being very broad.

MR. ANDERSON: Section 7 of the original act provided for the seizure of property and the holding of same by the Alien Property Custodian, taking it over, and Section 12 of the original act to which I wish to call attention is:

> "The Alien Property Custodian shall be vested with all the powers of a common-law trustee in respect of all property, other than money, which shall come into his possession in pursuance of the provisions of this act, and, acting under the supervision and direction of the President, and under such rules and regulations as the President shall prescribe, may manage such property and do any act or things in respect thereof or make any disposition thereof or of any part thereof, by sale or otherwise, and exercise any rights which may be or become appurtenant thereto or to the ownership thereof, if and when necessary to prevent waste and protect such property and to the end that interests of the United States in such property and rights or of such person as may ultimately become entitled thereto, or to the proceeds thereof, may be preserved and safeguarded."

It may not be inappropriate, as it will become an important question in this case, to call the attention of the Court to the fact that there was at this point, at the very outset of this legislation, a distinct declaration as to the interests of the United States in such property and the rights of such persons as might be ultimately entitled thereto, the ultimate determination of the persons who would be entitled thereto being

by the act itself vested in or reserved to Congress. The act provided that at the conclusion of the war, any claim either to the property or the proceeds thereof, should be disposed of as Congress might direct.

That act as originally passed was construed by the distinguished gentleman who was thereafter appointed Alien Property Custodian, as we shall show in this case by his declarations to be an act for the custody of the alien property and the preservation thereof, and it imposed upon the Alien Property Custodian, as the hand or agent of the United States, the very high duty of a Trustee. The act uses the term "Common-Law Trustee." I am frank to say I do not know just what that means, but I suppose it probably means a Trustee under the principles of equity as administered by the Chancery Court of Great Britain, and adopted by the United States. But in any event whether that word had been used or not, the provisions of the act itself, and the duties imposed upon the Alien Property Custodian, were such as to constitute the highest character of trust for the preservation of the property; and authority for the sale thereof was at that time limited to the prevention of waste.

Under that act, the Alien Property Custodian was appointed, as I will point out more at length hereafter. Then, by an act of March 28th, the General Deficiency Bill of March 28, 1918, there was an amendment of this section, which amendment will be found on pages 36 and 37 of the act as printed and now before the Court to which I will call your Honor's attention. The immediately pertinent provision is as follows:

> "The Alien Property Custodian shall be vested with all of the powers of a common-law

trustee in respect of all property, other than money, which has been or shall be, or which has been or shall be required to be, conveyed, transferred, assigned, delivered, or paid over to him in pursuance of the provisions of this act, and, in addition thereto, acting under the supervision and direction of the President, and under such rules and regulations as the President shall prescribe, shall have power to manage such property and do any act or things in respect thereof, or make any disposition thereof, or of any part thereof, by sale or otherwise, and exercise any rights or powers which may be or become appurtenant thereto or to the ownership thereof in like manner as though he were the absolute owner thereof: PROVIDED, That any property sold under this act, except when sold to the United States, shall be sold only to American citizens, at public sale to the highest bidder, after public advertisement of time and place of sale which shall be where the property or a major portion thereof is situated, unless the President, stating the reasons therefor, in the public interest shall otherwise determine: PROVIDED FURTHER, That when sold at public sale, the Alien Property Custodian, upon the order of the President stating the reasons therefor, shall have the right to reject all bids and resell such property at public sale or otherwise as the President may direct."

Now, in connection with this section as thus amended, and as it stands today, it is necessary, in order to get the picture, to refer briefly to Section 9 of the act, which I will not read, but merely state its terms. Under Section 9 of the act, any person whose property was seized and who claimed that the property was wrongfully seized, because he was not an enemy or an ally of an enemy, or for other reasons stated in the act, had the right to apply to the President for restoration of his property, and if it was not restored within sixty days, he had the right to

apply to the United States District Court, and have the matter adjudicated. In the meantime, the act required that the Alien Property Custodian should hold the property to await the final adjudication of such claim.

Now, then, taking these sections together, and as a little section out of this long Statute, the facts stood on March 28, 1918, that the Enemy Property Custodian had the power to seize property of persons determined to be enemies or allies of enemies, and to take it into his custody; that he had the power of a common-law trustee to hold that property and administer it, that was the power conferred upon him. Powers were conferred direct upon the Alien Property Custodian, by the act, but his management of the property, his disposition of the property, his accounting for the property, were all placed under the control and direction of the President, and he was given, by this act, as amended, power of sale; power to make a good title to the purchaser, but in order to do so, he must sell at public auction—leaving out sales to the United States—to the highest bidder, after due advertisement at the place where the majority of the property was located, unless the President, stating the reasons thereof in the public interest should otherwise determine.

I will take up the Alien Property Custodian next. Under the provisions of this act the President, on October 12, 1917, signed an Executive order by which in pursuance of the provisions of Section 5, which I first read to your Honor, giving to the President the right to exercise the powers conferred upon him, through such officer as he might direct, the President directed the exercise of the powers with which he was clothed under this act, and the discharge of the duties under this act by various officers of the Gov-

ernment. He assigned certain duties to the Secretary of State, created the War Trade Board, and assigned the regulation and issuing of licenses and other duties in regard to communication and other relations with the enemy to that. He created the War Trade Council and made that an advisory council as to the exercise of certain duties under the act. He assigned certain duties to the Secretary of War, certain duties to the Secretary of the Navy, certain duties to be exercised under the act to the Secretary of Commerce, certain other duties, and especially those under Section 9, with respect to the determination whether the property was correctly seized or not, and control of litigation relating thereto to the Attorney General. Thus, the various duties under the act appropriate or pertinent to the various departments of Government were directed to be exercised by them or by the War Boards or Commissions created for that purpose.

Then by one clause of this order he provided that the administrative features of Section 12 of the act and of Section 7, as I recall, and possibly others, should be exercised by an Alien Property Custodian as provided by the act itself, to be thereafter appointed.

Almost immediately thereafter he appointed the Honorable A. Mitchell Palmer, Alien Property Custodian, and Mr. Palmer, having duly qualified, discharged those duties until the 4th of March, 1919, when he became Attorney General of the United States. Mr. Francis P. Garvan was then appointed Alien Property Custodian in his stead. Up to that time Mr. Garvan, as the record will show, had been the head of the Bureau of Investigation of the Alien Property Custodian, with an office in New York, and a very active assistant to the Alien Property Custodian. Mr. Garvan qualified on March 4, 1919, and

continued to exercise the duties of the office of the Alien Property Custodian until about March 12, 1921, when Colonel Thomas W. Miller was appointed Alien Property Custodian, and has since so continued.

Among the other duties assigned by the President in the order of October 12, 1917, was a duty assigned to the Federal Trade Commission to license the use of enemy patents. By Section 10, of the Alien Property Act, to which he referred, provision was made for the right to the alien under the conditions therein prescribed, to prosecute applications for patents, the payment of fees and things of that kind, under the regulations of this act, and also for the licensing by the President of the use of alien enemy patents which have been granted in the United States. The President, by the provisions of the order to which I have referred, Sections 17 to 21 thereof, directed the exercise—to use the correct language of the act—of this function so imposed upon him, through the Federal Trade Commission, and thereafter from time to time the Federal Trade Commission did license various persons to use the enemy patents in the United States. I think the record will show that approximately 128 such licenses had been granted up to the time of the transactions under review in this suit.

The original act did not provide for the seizure of enemy patents, but it was construed by the Attorney General and, as I think the record will show, by other officers, including the Alien Property Custodian himself, not to authorize a seizure of patents, of enemy-owned patents, it being contemplated that the use of these patents would be controlled under Section 10 of the act through license by the President, which power to license was assigned to and exercised by the Federal Trade Commission.

But we shall undertake to show to your Honor that after the passage of the amendment of March 28, 1918,

and indeed before the passage of that amendment, the question of the seizure of enemy patents had been considered by the Alien Property Custodian's office and the opinion of the Attorney General was obtained as to whether they could be seized, and it was held that they could not be.

Finding that condition to exist, the Alien Property Custodian, it appears from the record, was confronted with some embarrassment in the sale of property. For instance, he would seize an enemy-owned plant such as the Bayer Chemical Company and others, and find that that plant was operated to a large extent in the manufacture of patented articles or articles covered by German patents. He wanted to sell the plant. The buyer might obtain licenses from the Federal Trade Commission to operate the plant, and the Federal Trade Commission could issue exclusive or non-exclusive licenses. It confined itself with few exceptions to non-exclusive licenses. It could and did issue licenses for the life of the patent. But under Section 10 the owner of the patent at the conclusion of the war would have the right to come into court and not only claim the amount of the royalties, but also have the court ascertain whether the royalty fixed by the license was a fair royalty or not; and, of course, this offered some obstacle to the sale of plants operating for the manufacture of patented articles, since there was some uncertainty as to the terms of the use of the patents even when licensed for the term of the patents by the Federal Trade Commission.

The Alien Property Custodian brought these conditions to the attention of Congress and asked for an amendment to Section 7 of the act. That amendment was passed late in October, 1918, and was actually approved by the President on the 4th of November,

1918. It will be found at pages 19 to 21 of the act, to which I want to call your Honor's attention.

Not only, I might say, was there embarrassment, apparent from the record, as we will show to your Honor, in the matter of the sale of plants using enemy patents, but there was also some embarrassment in connection with the transfer of property where the certificates of stock of the corporations were held abroad or were not available to the Alien Property Custodian, and therefore he asked for an amendment to the Statute authorizing him to require the issue of new certificates of stock or what might be called alternative certificates of stock, where he could not obtain the originals in order to effectuate his transfer. There were some other questions involved in the matter, such as the complications which might arise in connection with suits under Section 9.

All of this we will undertake to exhibit to the Court in the proper way. For instance, property like stocks in a corporation might be seized and sold the next day, they might be seized and very promptly sold, and there would be no opportunity for the person to make a claim or anything of that kind. It was not desired by the Alien Property Custodian and he thought it unwise to have that situation stand as it was, so he wanted an amendment to the act which would transfer the right of the owner of the property from the actual property itself to the proceeds of the property sold, and confine his subsequent right to the enforcement of his claim to the proceeds and not to the property. It was very much like a foreclosure sale in a suit in equity, in a railroad foreclosure, before the lien is ascertained. They do not ascertain the lien, they sell the property and let them fight the matter as to liens on the proceeds.

Those considerations called for the following amendment to that Statute, approved by the President on the 4th day of November, 1918:

"If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade-marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belong or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered, and disposed of as elsewhere provided in this act."

In other words, the act was broadened from its original terms in relation to other property, to include expressly the power to seize patents, trademarks, copyrights, etc., which, as I have pointed out, the Attorney General held were not within the contemplation of the original act.

"Any requirement made pursuant to this act, or a duly certified copy thereof, may be filed, registered, or recorded in any office for the filing, registering, or recording of conveyances"—

That is a method of seizure, and is rather immaterial. The act further provides:

"Whenever any such property shall consist of shares of stock or other beneficial interest in any corporation, association, or company or trust, it shall be the duty of the corporation, association, or company or trustee or trustees issuing such shares or any certificates or other instruments representing the

same or any other beneficial interest to cancel upon its, his, or their books all shares of stock or other beneficial interest standing upon its, his, or their books in the name of any person or persons, or held for, on account of, or on behalf of, or for the benefit of any person or persons who shall have been determined by the President, after investigation, to be an enemy or ally of enemy, and which shall have been required to be conveyed, transferred, assigned, or delivered to the Alien Property Custodian or seized by him, and in lieu thereof to issue certificates or other instruments for such shares or other beneficial interest to the Alien Property Custodian or otherwise, as the Alien Property Custodian shall require."

That provision was put in to meet the embarrassment as to the stock certificates. Then the final paragraph of the amendment:

"The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this act, and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States."

If your Honor please, that is the law, as far as I now recall, dealing with the material aspects of this case, other than Presidential orders, which I shall take up in their order presently. We shall contend, in order that your Honor may understand the application of any evidence presented, that the situation thus presented was that the Alien Property Custo-

dian became and was at the time of the transactions to be reviewed in this suit authorized to seize and take over enemy patents the same as any other enemy property, to hold the same as Trustee under the terms of the act, with the power of sale vested in the Trustee, of that character, of the property, but subject to the limitation that it must be sold at public auction to the highest bidder after due advertisement of the time and place thereof, with a description of the property and its location; with only one exception, that the President, stating the reasons therefor in the public interest, might determine otherwise as to the method of sale.

We will present evidence which we think is pertinent to show that the conditions and considerations which I have outlined were presented to the Committee of Congress which passed upon this act and amendment, and were presented to the President of the United States as the purpose of this amendment; that is, to enable them to seize patents in order to sell patents and effectively convey title thereto, to issue stock, and relieve any embarrassment growing out of the operations of Section 9 by expressly transferring the rights of the property owner from the property, when sold, to the proceeds of sale held in the custody of the United States, like the proceeds in the custody of the Court.

THE COURT: Will it be convenient for you at this point to tell me what your ultimate conclusion will be from those premises?

MR. ANDERSON: Yes, your Honor, I will tell you that now. I would be glad if your Honor would ask me such questions, because I am not feeling very well this morning—and am not perhaps as clear as I should be.

My ultimate conclusion from that will be this—

that the Alien Property Custodian in this case, acting as I shall assume from the highest of motives—I am trying to eliminate from this case any question as to motives in the exercise of legal rights and discharge of legal duties, because that is for the Court to determine—that Alien Property Custodian, acting in co-operation with the large interest in the country engaged in the manufacture and sale of dye stuffs and chemicals, sold this property to a corporation, or sold some 4500 patents, or 4800 patents, trade-marks, etc., from time to time, to a corporation organized under the laws of Delaware, in which the interests concerned in the use of those patents were the sole stockholders, and substantially all the interests concerned in the use of those patents were combined for the purpose of buying the same.

THE COURT: I think possibly I did not state what I had in mind very clearly. You were dealing with the Statute and as I understood you, you said that the representations to Congress and the representations to the President were that the amendments were asked for for a specific purpose, namely, to enable them to dispose of alien property, physical property.

MR. ANDERSON: Yes.

THE COURT: And I assumed that you were going to draw a conclusion that by reason of those representations the amendments were either unlawful or that they should be limited in their construction.

MR. ANDERSON: No, sir. I am very glad your Honor interrupted me, because I was anticipating my statement in order to answer your Honor's question. I have to get more facts before the Court before I can state my conclusions on the whole case.

Our contention there is that at the time this act was passed it was contemplated and it was the purpose of the act to facilitate the sale of physical property; that subsequent to that time, as we aver in the

Bill, at the inducement of persons who had large financial interests in the accomplishment of that result, the purpose of the act, though possibly within its terms, its purpose was greatly enlarged, and that these patents which were in no way connected with property to be sold by the Alien Property Custodian were then seized in large quantities and in bulk, and sold in bulk upon the inducement of persons who had interests to serve in having them sold, and that, therefore, that is one of the circumstances which, while it may be within the terms of the act and probably is, is one of the aggravating circumstances—I will state it that way—of this case which the Court must consider.

I come now to that phase of the matter. It is averred in the Bill in this case and we think will be shown, and in fact is admitted and stated in one of the exhibits of the answer, that prior to the transactions here involved, 1917 and 1918, there had been developments of the dye and chemical industry in this country looking to the control thereof by certain large interests in that industry, through the combination of those in control.

If your Honor please, I want to make it quite clear when I begin the statement of this phase of this case, that we are not here to try strictly a monopoly case or a case under the Sherman Anti-Trust Act in restraint of trade. I am avoiding in this statement, and hope we can avoid throughout any contention of intentional wrong. Men differ. But I think it is pertinent to this case as bearing upon the sale of this property the subsequent sale to a corporation all of the stock of which was held by the interests to which I refer, to show such a combination of bidders for the purchase of trust property, which is one of the elements which is to be considered in ascertaining if the sale be valid, to show the development of this

combination, and its leading up to the fact and purpose of getting control of these patents, and bringing about a private sale thereof, under terms which we will contend were ridiculous as to the matter of consideration, through such combination of bidders, which, of course, is one of the facts which equity will consider. Whether there should develop in this case what is commonly called a monopoly, or such transactions in restraint of trade as would affect the validity of the sale, may or may not become important. But in dealing with the sale of trust property any facts tending to show that there was a combination of the bidders and a deliberate combination of the bidders which made a fair and open sale of the property impossible, are of the greatest importance as going to the validity of that sale.

It is more in that connection that I wish to refer to this matter than it is in a desire to bring criticism upon or to challenge at least the integrity of the acts of those engaged in this trade. In fact I may say, that there may be no misunderstanding of my position in this case, that I feel that there will be great service to this country in making it a self-sustaining unit so far as practicable in all the essentials of life and defense. I would not take one brick from the structure of the commercial glory of the United States. But there are legitimate means for the protection of the American industry and the advancement of American industrial interests. The policy in that regard and the means to be adopted to that end are questions to be determined by the Congress of the United States and not by the industries themselves if they transcend the rights of other persons, or by any private corporation, however high may be its motive or however sincere its beliefs. If I were in Congress myself I think I would vote for

very decided protection to the character of business mentioned, but that consideration is for Congress and does not affect the legal rights of the parties to this suit.

It will appear, and we will undertake to show by the evidence in this case, that prior to the middle of 1918 there had been very large combinations of these dyestuffs and chemical industries into certain corporate organizations by merger. That is admitted and stated in the exhibits to the answer. The first result of the largest of those mergers at that immediate time was the National Aniline Company. It will further appear that these companies and others engaged in the same business were, soon after that time, consolidated into the much larger consolidation of the Allied Chemical and Dyestuffs Corporation, and that there were other measures taken to bring about a combination of interests and a general control by certain of these interests—I am not calling off any names, because I am trying to keep them out of this case, it is immaterial who they were—for the control of the dyestuffs and related chemical industry of the United States. Among others, as we shall show to your Honor, was the organization of the American Dyes Institute in the early part of 1918, when the termination of the war in due time was, of course, in contemplation and when it was but natural that the dye people and other manufacturers engaged in business of this character should be looking to the period beyond termination for the protection and safeguard of their interests.

They organized this institution in April, 1918, and while the membership did not embrace all the manufacturers, according to the evidence as we will show to your Honor it embraced at least 90 per cent of the production. That is, the production of those who were members totaled at least 90 per cent of the stuff pro-

duced. They had among other things the method, and plans, as we will show, for the exchange of information among themselves.

THE COURT: Which do you mean?

MR. ANDERSON: The American Dye Institute—for the exchange of information among themselves and for the open price plan or Eddy Open Price Plan, so-called, which was recently condemned by the Supreme Court in the Hardwood cases, and was then promptly abandoned by the dye people.

They thus developed a close association of interests and a purpose. As early as the summer of 1918, before this act was amended by that amendment allowing the seizure of patents, leading representatives of that Institution and of the large corporate interests represented thereby, conferred with the representatives of the Alien Property Custodian and called to see them for the purpose of discussing the question of these German patents after the war.

And as a result of these conferences thus initiated, there gradually developed an increasing interest in these German patents, which it was claimed, and is not clear, as I understand, and certainly is stated in the Answer, exercised a potential, if not the actual control over the dye stuffs and chemical industry of the United States.

It was represented, and I think the evidence clearly shows, and the Answer sets it up, that many of these patents control essential products of the United States, they being the processes of manufacture or being product patents covering both the manufacture and the importation thereof from other countries; and that through the processes and product patents thus held by Germans, granted by the Government of the United States to Germans before the war, a substantial or potential control over that branch of American industry could be exercised.

That was the claim. Whether it was true or whether it is true, will be one of the facts to be developed in this case, but we will take it for the present and for the purpose of my discussion as a claim.

Under these circumstances, as I have said, the interest in these German patents and their disposition after the war became naturally greatly increased with the approaching end of the war.

When the act of November 4th was passed, the war was substantially at an end so far as active operations were concerned, and immediately after its termination, as your Honor knows, the President went to Paris to negotiate the Treaty of Peace, on December 4, 1918, just one month later than the signing of this amendment to the act allowing the seizure of patents.

It appears that the seizure of patents during that period of two months, we will say, following the passage of this act, was confined to those patents which related to industries which the Alien Property Custodian proposed to sell—that is, which were in use in or connected with those industries.

However, in January 1919, the question of the great bulk of the German patents, issued in the United States, especially those relating to dye stuffs and chemicals, seems to have become acute, and was the subject of numerous conferences and negotiations between the representatives of the American Dyes Institute and the representatives of the Alien Property Custodian, or, in some instances, himself.

As a result, along about January, 1919—I think it was the 22nd or 23rd—the exact date is immaterial —or in January, prior to that date, there had been held a number of meetings of the Executive Committee and the membership of the American Dyes Institute, to consider means by which these patents could be obtained in their interests or I will say, to use their

own euphonious expression—in the interest of American Industry.

As a result of these conferences, a Committee of the American Dyes Institute was appointed, to take up this matter with the Alien Property Custodian, and they did so take it up.

They held a conference in Washington on January 27, 1919. The Alien Property Custodian being ill, was not present. At that conference there were a number of representatives of the Alien Property Custodian and of the American Dyes Institute—leading men in that business; and it was agreed—I might say that there was first some discussion of selling these patents direct in groups or classes to the various manufacturing interests which might be interested in that particular class of patents, that was first considered. It was finally at this conference determined that they would organize a corporation to take over all of these patents and hold the same, licensing their use to persons who desire to use them; manufacturing interests, American interests; confining those licenses to American citizens or to corporations in which a certain controlling proportion of the stock was held by American citizens; or to the United States. And at that conference, it will appear that there was a good deal of discussion as to the number of patents which would be seizable as applying to these classes which we will call "Dye and Chemical patents."

One of the representatives of the Dyes interests of the National Aniline, I think, present, suggested that there would probably be a thousand patents. Another, one of the representatives of the Alien Property Custodian, suggested that there might be three thousand patents.

The question of sale was considered, and it was suggested by the Patent Counsel of the Alien Prop-

erty Custodian, that a price of $250,000 be given for all the patents; the exact number at that time obviously not being known, as shown by the record of that meeting; and then it was decided to let that question be submitted to the Advisory Sales Committee.

As a result of that conference, however, it was determined to organize this corporation, and it was further determined to proceed at once to seize—have the Alien Property Custodian seize—all of the German patents which related to the subjects under discussion; and it was further arranged, either at this conference or just before—whether just before or immediately after is immaterial—that in order to facilitate that seizure, which it was then deemed very necessary to hurry as much as possible, because the general belief was that the Treaty of Peace would be signed in a very short time—to facilitate that seizure the Counsel for the National Aniline and Dye Stuffs Company, and for the duPont Company, largely interested in this business, should be sent to Washington and put in the Patent Office to select or aid in the selection of these patents which were to be seized.

So that we will contend, and we think the evidence in the case will show, that as a matter of fact the determination as to what patents should be seized and the patents actually seized and sold under the arrangement which had been agreed upon substantially in advance, was made, not by the Alien Property Custodian, but by the representatives of the dye industry, through their counsel stationed in the Patent Office at Washington.

It appears further that these counsel were sent to Washington immediately, and that a representative of the Alien Property Custodian's office, patent lawyer, was put in the Patent Office with them, and they worked night and day and Sunday, in listing all pat-

ents which they thought could relate to this subject. Some of them, as we will point out, did not. And, finally having made up the list—and as they made them up, the seizures or demands took place in accordance with the act. I need not go into the detail of that. And that work was completed in about three weeks, as I recall it, and the great bulk of these patents had been listed or seized by the latter part of February, 1919.

Now, I want to go back for a moment at this point to get the set-up of the situation at that time.

Prior to this transaction which I have just been reviewing, and after the passage of the amendment of March 28, 1918, which was the amendment clarifying and possibly enlarging the power of sale—the amendment to Section 12, authorizing the sale—the Alien Property Custodian, in order to carry out those enlarged powers of sale, organized under the direction of the President, a sales organization. He had a Manager of Sales, and he created by orders formulated by himself, and promulgated, certain advisory organizations in connection with those sales. There was a Washington Sales Commitee, made up of certain representatives of his office, which were supposed to pass upon all sales, the propriety thereof and the necessity therefor, and so forth—a comprehensive organization.

Then there was an Advisory Sales Committee, which was supposed to pass upon the price, and advise the Alien Property Custodian as to the sale.

This Advisory Sales Committee consisted of five gentlemen of high standing and character, of whom I desire to make no criticism whatever. If I recall them for the moment they were: Mr. Cleveland H. Dodge, Mr. Otto T. Bannard, Mr. Ralph Stone, of Detroit, Mr. B. Howell Griswold, Jr., and one other—

I have forgotten his name—Mr. George H. Ingraham, of New York; men of the highest character.

Then, the Alien Property Custodian, after formulating this organization, issued instructions or regulations controlling the sale. He issued regulations to the effect that the sales must be at public auction unless the President otherwise provided, and all cases of private sales would be submitted to the President; that subject to certain general rules, sales would be made at public auction whenever it was possible to do so, and unless the Advisory Committee recommended a different procedure. The plan provides that: "This not only applies to sales by the Alien Property Custodian, but also to sales by and in the name of corporations, controlled by him." And further: "Under no circumstances will any person in the employ or connected with the organization of the Alien Property Custodian be permitted to bid for or purchase any property or be interested directly or indirectly in any such purchase or in any corporation or syndicate interested therein. This provision also applies to local representatives and local attorneys in the sales of properties in respect of which they have represented or acted for the Alien Property Custodian."

These regulations were in effect at the time of the transactions here under review.

In pursuance of the agreement which had been made as heretofore between representatives of dyestuffs industry, or 90 per cent, thereof, through the American Dyes Institute and the Alien Property Custodian, or its representatives, arrangements were made to organize the defendant, The Chemical Foundation, Incorporated, under the laws of this State. It was organized in February, 1919, and then arrangements were perfected for the sale of that property, of the

patents so seized as I have indicated, to this Corporation.

I stated that the American Dyes Institute furnished the counsel who seized or who made the lists of the seizure of the patents at Washington. I should have stated also that the American Dyes Institute provided the money to pay the expenses of making these lists and this seizure.

THE COURT: Was the American Dyes Institute a corporation or an unincorporated association?

MR. ANDERSON: I think it was a corporation, sir, but it assessed this cost upon certain of its members, as they contributed proportionately. It was a New York corporation.

Now, the American Dyes Institute advanced all money for meeting the expenses of counsel and of clerical hire, in making up these lists in the Patent Office, at Washington, amounting to something over $6000. It was subsequently reimbursed out of the purchase price of the patents, it may be justly said, I think, as a fair conclusion to be drawn from the situation, as we will undertake to present it in the evidence, that the Dyes Institute not only inaugurated this scheme, if I may call it such without offense, for taking over these forty-five or forty-eight hundred patents, copyrights, and so forth, for the seizure thereof and for the transfer thereof to the defendant, but, as a matter of fact, they actually did the work in connection with the matter, advanced the money necessary to carry it into effect, and that their representatives made up the lists of patents which were to be seized or transferred.

Now, the Charter of the Chemical Foundation was granted on the 19th day of February, 1919, under the laws of this State. That is at page 90 of the Bill of Complaint as printed; and I will ask your Honor's attention to its provisions.

After the formal provisions, it says:

"The nature of the business of the corporation and the objects and purposes proposed to be transacted, promoted, or carried on by it are as follows, to wit: (a) To acquire by purchase from the Alien Property Custodian, under the provisions of an act of the Congress of the United States, known as the "trading with the enemy act" (act October 6, 1917, as amended by act of March 28, 1918, and further amended by act of November 4, 1918), patents, and applications therefor, trade-marks, choses in action, and rights and claims of every character and description, owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy, as defined by said act, which the Alien Property Custodian is authorized by said act, and amendments thereto, to require and seize, and to sell and convey, and also to acquire from any person, firm, or corporation any and all letters patent, and applications therefor, trade-marks, and similar rights granted by the United States, or any other country or government, licenses and the like, or any other interest therein, or any inventions which may seem capable of being used for or in connection with any of the objects or purposes of said corporation, and to hold any such property and rights so acquired in a fiduciary capacity for the Americanization of such industries as may be affected thereby, for the exclusion or elimination of alien interests hostile or detrimental to the said industries, and for the advancement of chemical and allied science and industry in the United States."

If your Honor please, I will pause for a moment at that point to make a comment which will make clear one of the issues in this case. The Alien Property Act provides that the Alien Property Custodian shall be a common-law trustee, whatever that is; but this Charter provides that The Chemical Foundation shall

hold these properties, which it was organized to purchase before the sale was authorized—a curious coincidence—in a beneficial capacity for the Americanization of American Industry.

I believe that one of the most famous matters in litigation in the United States, was the so-called Tilden will. One of the great lawyers of this country drew a will which was quite obviously, I think, invalid, and so held by the Courts; and certainly, the language of that Charter, if it was intended to create a trust obligation, or any obligation enforceable by the Courts in favor of anybody, is obviously void, as to such intention. It means nothing at all, because, who is American industry, and who can Americanize American industry, and what controls the Americanization of American Industry? Who is going to determine what American industries are affected thereby, directly or indirectly, or what is hostile to these industries; and if they determine it wrongly, how can a Court determine that question or administer this as a trust?

So that language in this Charter might as well be a blank piece of paper, so far as any obligation on The Chemical Foundation is concerned.

Clause 13 says:

> "In furtherance of such objects and purpose, the Corporation may"—I ask your Honor to note the expression—"may grant non-exclusive licenses only to make, use and sell the inventions covered by any of the patents under their control, or owned by them, to the United States of America, upon such terms as the Board of Directors may determine."

They thus reserve to themselves the right which they would have, anyhow, under any Charter, as the owner of the property, to license to the United States of America the use of these patents, which they were going to acquire from the United States of America,

such license if given to be non-exclusive, so that the United States could not get any exclusive rights in them—although it would have had the right if it had taken them for itself—such license to be

> "upon such terms as the Board of Directors may determine."

In other words, the United States had that right anyhow, and the rights of the United States, if any, to receive a license, unless it should exercise the power of eminent domain and condemned the patent, would be such as the three men constituting the Board of Directors of this Corporation, might see fit to impose, whoever they might be in the future.

And then the license should be non-exclusive. The United States could not get any exclusive rights, although it held this stuff, with the right to do with it as they saw fit, as we point out later. The licenses were also to be

> "upon reasonable and equal terms and without advantage, as between licensees to the following:
>
> (1) Natural persons, citizens of the United States;
>
> (2) Co-partnerships, all the members of which are citizens of the United States; and
>
> (3) Corporations organized under the laws of the United States or of any State, Territory, or dependency of the United States, of which not less than three-fourths of the capital stock and the beneficial interest therein, is owned by stockholders who are citizens of the United States, and who were not prior to the 'end of the war' as used in the trading with the emeny act, enemies or allies of enemies, as defined by said act, and the amendment thereto."

Therefore, we find that ation, as we shall undertake to point out by the dence and under

the law, organized before the authority for sale was ever obtained, in pursuance of a plan or agreement which had been entered into at a conference between the dyestuff industry and the Alien Property Custodian office three weeks before they could be sold at private sale, I think I should say that the evidence shows that the Alien Property Custodian was in favor of a public sale and that he was induced to agree to a private sale according to the testimony given before the Committees of Congrees.

However, he was not present at this conference and in accordance with the agreements there made where the price subsequently paid was suggested without knowing the number of patents, whether it was one thousand, three thousand or five thousand—it was finally 4500—the Corporation organized to buy them, though no authority had yet been given to sell them. That Corporation pointed out in its prospectus, as we shall show by an exhibit, as part of this record, filed with the Answer—"that it was authorized to grant to the United States licenses without compensation;" but did not say upon such terms as the Board of Directors might see fit; and further, by implication, at least, that it was bound to grant non-exclusive licenses to any member of the industry of the United States, whatever that may mean.

THE COURT: I missed that, Colonel Anderson. Will you point it out?

MR. ANDERSON: I say they certainly stated by implication, if not by the direct language, which I have not before me, and I hesitate to make the statement unless I have the language—that they were authorized and required to grant non-exclusive licenses to any members of the industry of the United States under these patents:

> "that the Board of Directors may refuse to issue any license, or may revoke any license granted by the Corporation, and may prescribe the terms and conditions of said licenses;"

but when you come to the Charter, you find——

THE COURT: What was it you said about the prospectus?

MR. ANDERSON: The prospectus of The Chemical Foundation filed with the exhibit to the Answer; I will not take time to read. Now, therefore, not only will your Honor find when you come to examine this record, that this Corporation was under no requirement to grant any licenses to the United States, exclusive or non-exclusive, which could be enforceable by the United States, but that if it did grant a license, it has to be non-exclusive, and subject to such terms and conditions as this Corporation Board of Directors might prescribe.

Not only was it not required to grant any license to any member of the industry who might be a little recalcitrant in its subsequent use, but they had the authority to decide for themselves by the Board of Directors consisting of three men, who might refuse to issue any license, or to revoke any license granted by the Corporation, and prescribe the terms and conditions of said licenses. This Charter further provides that:

> "It shall be the duty of the Corporation to defend and enforce the rights acquired by, and to protect the rights of its licensees of any license granted to it."

It then goes on to say:

> "To purchase and otherwise acquire property of every kind in the State of Delaware," and so forth. "To do each and everything necessary and useful and advisable for the accomplishment of these objects."

And then follow the provisions usual in Charters of that kind of a general character.

Now, the capital stock of the Corporation——

THE COURT: I was wondering whether it would be a relief to you to have five or ten minutes recess, at this time.

MR. ANDERSON: Just as your Honor chooses. I can stop now. I shall be very glad to stop for five minutes, if agreeable to you.

THE COURT: Five-minute recess.

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(After a short recess.)

MR. ANDERSON: At the time of the recess, I was discussing the Charter. I think I should go on in order to make my statement complete and call attention to the further provision of organization. The Charter provided for a capital stock of four hundred thousand dollars preferred and one hundred thousand dollars common, of shares of $100 each, and the preferred was limited to 6 per cent dividends. The Charter further provided that the Corporation should have a perpetual existence; that the property of the stockholders should not be liable for the debts, and so forth; that the number of directors should be fixed from time to time by the by-laws, and increased, as therein provided; that in case of any vacancy in the Board of Directors, for any cause, the stockholders should select a successor, to hold the office for the unexpired term. It then provided that the Board of Directors:

> "should, from time to time, fix and determine the uniform license fee or royalty that shall be paid by the persons, firms, or corporations mentioned in paragraph (b) of article 3 of this certificate, and the license fee or royalty so fixed shall be binding and conclusive on the corporation and upon all of its licensees."

Now, if your Honor will turn to paragraph B on page 91, you will find that that provision covers not only the Government of the United States, if it became a licensee, but all other persons who would receive licenses from this Corporation.

Now, on page 95 is the following:

> "In furtherance, but not in limitation of the powers conferred by law, the Board of Directors are expressly authorized——
>
> (a) To hold their meetings outside of the State of Delaware,"—and so forth.

To remove any officer or employee; to issue stock, of such classes as they may see fit, and then, by Section 9, it was provided the Charter may be amended from time to time by a vote of three-fourths in number and amount, of the preferred and common stockholders, at any annual or special meeting of the stockholders.

The Corporation was formed by three gentlemen here locally, who subscribed to the minimum amount of stock, in the usual form, and then retired in favor of the regular interests concerned. The By-laws will be found attached, but I do not recall any provision in them to which I deem it necessary at this time to call your Honor's attention.

That was in February, 1919.

It is now necessary for me to go back a bit. I have said that the President left America on the 4th of December, 1918, for Paris. On December 3, 1918, the day before he left, he signed an Executive order, which is one of the important documents in this case, and therefore I ask leave to read it at length. It is very short. It will be found on page 47 of the Answer, Defendant's Exhibit No. 1:

> "By virtue of the authority vested in me by 'An Act to define, regulate and punish trading

with the enemy, and for other purposes,' known as the 'Trading with the enemy Act,' approved October 6, 1917, and the amendments thereto, I hereby make the following orders and rules and regulations:

"I. I hereby vest in the Alien Property Custodian the executive administration of all of the provisions of sub-section (c) of section 7 of said 'Trading with the enemy Act' as amended by an Act entitled 'An Act making appropriations to supply deficiencies in appropriations for the fiscal year ending June 30, 1919, and prior fiscal years, on account of war expenses, and for other purposes,' approved November 4, 1918; and said Alien Property Custodian shall have the power and authority to prescribe forms and procedure for the exercise of the powers and authority vested in him.

"II. In the executive administration of said sub-section (c) of section 7 of said 'Trading with the enemy Act,' the Executive Orders heretofore issued by me by virtue of the authority vested in me by said 'Trading with the enemy Act' shall apply; and said Alien Property Custodian is hereby vested with all of the powers and authority heretofore granted to him or vested in him by all Executive Orders heretofore issued by me not inconsistent with this Order.

"III. The power and authority heretofore vested in the Federal Trade Commission to issue, pursuant to the provisions of sub-section (c) of Section 10 of the 'Trading with the enemy Act,' or to withhold or refuse a license to any citizen of the United States or any corporation organized within the United States, to manufacture or cause to be manufactured a machine, composition of matter or design, or to carry on or cause to be carried on a process under any patent, or to use any trademark, print, label or copyrighted matter owned or controlled by an enemy or ally of enemy, is hereby continued in full force and effect, provided:

"(1) That said Federal Trade Commission shall not have the power or authority to issue any such license whenever the patent, trademark, print, label or copyright with respect to which application for such license is made, shall have been conveyed, transferred, assigned or delivered to the Alien Property Custodian, in pursuance of his requirement, or seized by him, the Federal Trade Commission shall have no further power or authority with respect thereto.

"(2) That said Federal Trade Commission shall notify the Alien Property Custodian of all applications made to it for licenses under said sub-section (c) of Section 10 of the Trading with the enemy Act, so that he may, if he so desires, appear at any hearing and object to the issuance thereof. The Alien Property Custodian, in lieu of appearance, may file with the Federal Trade Commission objections to the issuance of any such license. In no event shall any license be issued until after the expiration of fifteen days after such notice of the application shall have been given to the Alien Property Custodian.

"IV. The Alien Property Custodian is hereby authorized to take all measures and do all things that may be necessary or expedient to administer the powers and authority conferred by this Order.

"V. I hereby vest in Frank L. Polk all power and authority conferred upon the President by the provisions of Section 12 of said 'Trading with the enemy Act' as amended, other than the Executive Administration of the provisions of said Section 12 pertaining to the designation of a Depositary or Depositaries, which Executive Administration was vested in the Alien Property Custodian by Executive Order of October 29, 1917, and which Executive Order is expressly ratified and continued in full force and effect; provided that this order shall not be construed to revoke or cancel the power and authority vested in the Attorney General by Paragraph XXXII of the Executive Order of October 12, 1917.

> "Nothing in this Order shall nullify or impair any license heretofore granted by the Federal Trade Commission, pursuant to the provisions of Section 10 of An Act of Congress entitled 'An Act to define, regulate, and punish trading with the Enemy, and for other purposes,' approved October 6, 1917.
>
> "(Signed) WOODROW WILSON."

MR. ANDERSON: Now, I would ask the especial attention of the Court in connection with the facts that we wish to present, to Section 5 of this Order:—

> "V. I hereby vest in Frank L. Polk all power and authority conferred upon the President by the provisions of Section 12 of said 'Trading with the enemy Act' as amended,"—and so forth.

At that time, as the evidence will show, Mr. Polk was Counsellor of the State Department, and in the absence of Mr. Lansing, who went to Paris with the President, became acting Secretary of State, the day after this Order was made.

The provision of the Order to which I refer is obviously intended to be an exercise of the power given by Section 5 of the Act.

> "That the President may exercise the powers granted by this Act, through such officers as he may direct."

That is the substance of it, and I think that is practically the language.

I am conscious of a very decided embarrassment in undertaking to present to your Honor the contentions which the Government will undertake to make in this connection, and the facts relevant thereto, because of my very high esteem for Mr. Polk; and of course every one who has the proper feelings of a citizen of the United States approaches the discussion of the acts of the President with an attitude of pro-

found deference, and with great hesitation also; but I need hardly say to this Court, as the Supreme Court has so often said, that the President, at last, is but an agent of the people, created by law, with only such powers as are given him by the Constitution or implied therefrom, or such as are conferred upon him by express Acts of Congress.

In this instance, the exercise of the power involved, was not a constitutional power in any sense. The President was not discharging in this connection, the functions imposed upon him, as the Chief Executive of the nation, directly by the Constitution, in which it must be admitted that he could exercise, and must exercise broad discretion which no one will question, and question only when it is necessary to preserve the limitations of the Constitution. In this particular instance, the President was an agency named by the Act of Congress, for the exercise of certain specific powers with which he was clothed by that Act, the highest and most appropriate agency that could have been selected for that purpose. If, therefore, it should be found, as we will with all possible respect contend, that the President misconstrued his powers, and misinterpreted this Act, then, of course, the Courts, as they have often done before, would be constrained to hold that if he acted outside the scope of his agency, just as any other agent, his act was void.

Now we shall undertake to contend in this case that the President had the power to exercise the general functions and duties imposed upon him by this Act either personally or through any officer which he might direct, and that an officer within the contemplation of that Act is an officer within the contemplation of the provision of the Constitution of the United States, that is, an officer appointed by the President, by and with the consent of the Senate, which are the only officers of the United States within the contem-

plation of the Constitution, although he has the power to appoint subordinate officers and agents to carry out those duties. There will be no intention to controvert the recognized rule that when the President is discharging a function of his office through an appropriate agency, such as the functions of war, through the Secretary of War, or the exercise of the power over the Navy, by the Secretary of the Navy, or the control of litigation like this, through the Attorney General, it is the act of the President, because he is exercising the function through that officer. But it will be contended that even the President with his great power can not vest the executive functions vested in him by law, in any person he may see fit, and permit or authorize that person to legitimately exercise those functions in his behalf.

It will further be contended in this case that the particular power here involved was one which the President could not delegate to any one, under the terms of the Act itself construed in the light of all its provisions.

Let me first make clear my position with respect to the appointing of Mr. Polk, and it is this: Mr. Polk was Counsellor of the State Department, and afterwards Acting Secretary of State; but the President did not vest in the Secretary of State or the Acting Secretary of State the authority which he sought to confer. In every other instance in this entire Act, in its administration, the President vested the exercise of the powers in the office, in the Secretary of State, in the Secretary of War, in the Attorney General, in the Federal Trade Commission, and so on, and if the person holding that office died, or if the person holding that office were incapable of acting, and someone else was acting in his place, the act of that person for the time being would be the act of their office, and thus the act of the President. But in this case, however,

as Mr. Polk expressed it to me himself, he undertook to make Mr. Polk, for the purposes of this Act, the Acting President of the United States personally. He did not vest these powers assuming he had the power to do so, in an officer of the United States. What he undertook to do was to vest these executive powers in Mr. Polk personally, Frank L. Polk, and Mr. Polk, as I shall show your Honor, signed every one of these orders personally. Not one of them bears any title or evidence that he was acting in an official capacity, and he did not claim to so act.

If the President can confer an executive power of this importance upon Mr. Polk—for whose ability I have the highest esteem—he could have conferred it upon anybody who happened to be passing the White House at that minute, by picking him on the sidewalk. If he could have conferred it upon Mr. Polk without Mr. Polk taking the Oath of Office which the Constitution requires the President of the United States to take before he can exercise his functions, then the President of the United States can clothe anybody with executive functions whenever he sees fit to do so, and such person can exercise those executive functions, without complying with the constitutional requirement, to take the Oath of Office. Mr. Polk never took any Oath of Office in connection with the discharge of these duties.

It is not surprising, perhaps, that the President, in the rush of that time, could not look at all these things, but [illegible] he was badly advised perhaps with the best intention, on the part of the people who advised him. I do not question that for a minute, but that they entirely misapprehended both the function of the President and the intent of this Act, and that this effort to delegate that authority to Mr. Polk, not to the office and not to an officer of the United States, was void, as a delegation of the executive power to a per-

son who had never taken the oath of office to exercise that power, a delegation to him personally in his personal capacity, and lastly, if it be construed otherwise, it constitutes an effort to create an office of the United States which can only be done under the Constitution by an Act of Congress.

Now, in the next place, we shall contend here that that was a void effort to delegate power, because it was a power incapable of delegation, even by the President.

Again, I want to say that I recognize the lines of decisions, even the decision on this Act, that the acts of officers of the Government, acting under the President, and exercising the functions imposed upon him within the general scope of their duties are in contemplation of law, the acts of the President for obvious and practical reasons. That is settled law of course. But there are certain powers the President can not delegate, and the question of whether he can delegate those powers is a question of the construction of the law by which the power is conferred. For instance, I assume that no one would contend that the President of the United States could delegate the power to pass upon a court martial, although he is the Commander-in-Chief of the Army. The Secretary of War acts in his name, and orders given by the Secretary of War are his orders; but he must personally pass on the court martial. This the Supreme Court has held.

I do not suppose anybody would contend that the power of pardon could be exercised by the Attorney General, and it would be the act of the President. In this particular case it will be noted that this act is very interesting in one aspect — that every power practically in this Act is one which is in its general administration; the Courts have often said, that powers of general administration with which the President is clothed, must be exercised by others, as a matter of

physical necessity. The general administration of this Act is vested in the Alien Property Custodian, that is as to some of its provisions, no matter who holds that office. As of others, the administration is vested in the Secretary of War, and so on. These are powers of general administration. The Alien Property Custodian is given the power to determine whether the property is the property of an enemy or the ally of an enemy. That is an exercise of a discretion, but it is a discretion essential in the exercise of the administrative features of the Act. It was something that the President could not possibly do personally, and must, therefore, be done through some other officer, just as various officers exercise discretion over public lands, and so forth, in the name of the President.

But in this particular case, Congress, even in time of war, manifested a care with respect to the sacred obligations assumed by the United States as to enemy property, a trust of the highest character, as Chief Justice Marshall once said, and would not even give the President himself the general discretion to deal with the subject.

If your Honor will notice the provision of Section 12, it says that the Alien Property Custodian shall have the powers of the common-law trustee to hold and administer this property, and "under the direction of and under regulations prescribed by the President, shall manage, hold and sell the same;" and then——

> "Provided also that he shall sell at public auction to the highest bidder, after due advertisement at the place where the majority of the property is located"——

eliminating the United States for the moment. Those are four things absolutely required for a fair sale. Why? A fair sale of trust property was to be a pub-

lic sale. But there were certain conditions which might arise in the progress of the war, such as actually did arise, where it is necessary to qualify the directors of the Corporation to act as directors, when you would not want to put up three shares of stock at a public sale, in order that the director might buy it, or where the amount of property involved was so small that it would not justify the expense, or where other conditions prevailed, so that Congress provided for a public sale in all instances.

> "Unless the President"—stating the reasons therefor, "in the public interest shall otherwise direct."

Now, that is one of the few times, as I recall, in the history of the United States where even the President himself, in the exercise of discretion, has been required to state the reasons therefor; and it shows that such reasons must be in the public interest in order to violate the principle and settled rule, that public property must be sold at public auction to the highest bidder. This was public property, and the interests of the United States therein had already been declared by Congress.

Now, we contend to take that act as a whole, that duty was clearly non-delegable, upon familiar principles which I need not discuss before this Court, but we will discuss if necessary. The President recognized this as non-delegable, and so construed it. He delegated practically every other executive or administrative power in that Act, not only administrative but executive, but he never delegated *this* until he went to Paris. There were any number of executive orders authorizing private sales of two hundred bales of cotton, or some tobacco, or stock, or this or that, or property under $10,000, in value, every one of them was signed by the President himself. He did not al-

low anybody to exercise that function; but in this instance, in the hurry and haste of departure to the heavy duties which he had assumed, he undertook not only to delegate the power, but to vest in Frank L. Polk all power and authority, and thus divest himself, as President, of all power and authority, because he could not vest all power and authority in one man, and exercise it himself. He, thus, divested himself of every authority under this Act, as President of the United States. Authority and discretion which Congress had vested in him, out of consideration for his high character and high position and known sentiments of humanity, he undertakes to vest in another, and while he chose a man also of the highest character and highest position, if he had the power to so divest himself, he could vest it in anybody, a man on the street, as well as anybody else. The exercise of that, the highest function which had been reserved to him personally by Congress, as a control over this extraordinary method of selling property which the Government held in trust, I say, in the language of Mr. Justice Field, if your Honor please, that it would be a most mischievous doctrine if any such transactions could be sustained on behalf of the agents of the people who operate the Government of the United States, however high they may be, and however noble may be their purpose. Therefore, we shall make these contentions, that the Act or Order of December 3, 1918, was absolutely void so far as the effort to vest this authority in Mr. Polk was concerned.

That Order was entered on the 3rd of December, and the President left on the 4th. He returned to America on the 24th of February, reached Washington on the 25th of February, 1919. He went back on the 5th of March.

On the 26th of February, 1919, with the President in the White House, Mr. Polk entered an Order pre-

pared by the office of the Alien Property Custodian—in New York really—and sent to him, with a letter requesting him to execute it. Upon that Order rests the title to the property involved in this suit. Therefore, we had better get it straight. It will be found at page 111 of the Answer. After reciting the provisions of the Act: "By virtue of the authority vested in the President by Act of Congress," and so forth—"which authority has been delegated to me by the Executive Order No. 3016 and signed by the President under the third day of December, 1918, I hereby, in the public interest make the following determination and order." Signed, as your Honor will notice, "Frank L. Polk." In what capacity I do not know, except as an individual. The Order then provides:

> "The Alien Property Custodian may release and discharge the United States of America and any department thereof upon such terms and conditions as to the Alien Property Custodian may seem proper, from any and all claims and demands arising from any alleged infringement of the Letters Patent, trade-marks and rights under Letters Patent and trade-marks hereinafter referred to."

That particular provision of this Order is not involved in this suit, but as indicating the entire misapprehension of the meaning of this Act and of the powers which Mr. Polk was seeking to exercise, it is well to stop to inquire where in this Act there is any authority given to Mr. Polk or anyone else to release the rights of enemy owners in property to the United States or any one else. Unless such authority is clearly given, under the war power, it is an Act of confiscation, and therefore void. It is not my province to discuss that question, but it is well to consider it as bearing upon this general aspect. The Order further provides:

"The Alien Property Custodian may sell at private sale without public or other advertisement to The Chemical Foundation, Inc., a corporation organized and existing under and by virtue of the laws of the State of Delaware, at such place and upon such terms and conditions as to the Alien Property Custodian or his authorized agent may seem proper, all of the Letters Patent, trade-marks and rights under Letters Patent and trade-marks, including all profits and damages recoverable at law or in equity"——

Now, your Honor will just look at that language for a minute—

"all profits and damages recoverable at law or in equity for the past infringement thereof which the Alien Property Custodian may seize or may have seized under the provisions of the said Trading with the Enemy Act and the amendments thereto, now or hereafter enacted, and which he from time to time shall determine relate to the objects and purposes of said The Chemical Foundation, Inc., as expressed and defined by its Charter."

In other words, this gentleman, the acting President of the United States, in so far as this matter is concerned, if authorized to act at all, undertakes to release and to transfer to this company not only the patents which had been seized, with all future rights as to them, but all rights to possible infringements or wrongs as to the former owners; and also not only patents thus seized, but those which might thereafter be seized, not only under the then Act, but which under future act of Congress which might be passed as an amendment to this Act, the Alien Property Custodian might determine belonged or related to the business of the Chemical Foundation, Incorporated. In other words, the President has vested all power and authority in Mr. Polk, and Mr. Polk, in turn, vests all

power and authority in the Alien Property Custodian, to make private sale of anything that he may determine relates to the purpose of The Chemical Foundation.

Then:

"My reasons in the public interest for the foregoing determination, order, rule and regulation are:

"First: A similar order, rule and regulation relating to letters patent, trade-marks and similar rights has been made by me the twenty-sixth day of February, 1919, and this order is supplemental thereto and necessary to fully carry out the objects and purposes of said order of February twenty-sixth, 1919."

Then: "Second: Said copyrights, applications for letters patent and for the registration of trade-marks and copyrights can not be sold to the best advantage at public sale after public or other advertisement."

Well, that is a matter of opinion. It was a question, if to be determined at all in such broad terms, was to be determined by Congress or by the President himself. That was to be his opinion, with his large experience and with his known views on the subject. It never was his opinion, so far as this order shows. He was in the White House, and we will show your Honor that he was so busy that he could not give it consideration.

"Third: The Chemical Foundation, Inc., has been incorporated for the purpose of holding letters patent, trade-marks and similar rights relating to the chemical and allied sciences as a trustee for American industry, for the purpose of the Americanization of such industries as may be affected thereby, of eliminating alien interests hostile to said American industries and of the advancement of chemical and allied industries in the United States."

Trustee for American industry. I have already pointed out that such a trustee was created to be void from the day it was created, but at any event that is what it is. That is what it was organized for.

> "The Chemical Foundation, Inc., is obligated to grant non-exclusive licenses upon equal terms at a uniform royalty to qualified American manufacturers and is empowered to grant free licenses to the United States for any use the United States may desire to make of the inventions covered by said letters patent, and similar rights."

Now, if your Honor please, I will try to point out in this trial that while the Chemical Foundation was authorized to grant licenses to the United States, it does not say a free license. It says upon such terms and conditions as the Board of Directors may determine—three men,—but I have not been able to find any provision requiring or compelling it to grant non-exclusive licenses to any qualified American manufacturers; and therefore the order does not state the facts as to the Charter, so far as I can find, and the very terms of the Charter itself provide, so far as to giving authority to grant non-exclusive licenses to any qualified manufacturer,—the Charter itself provides the Board of Directors may refuse to issue any license, or may revoke any license.

There is the essential, fundamental fact in connection with this whole matter, misstated in the face of the order, and the whole purpose is misrepresented on the face of the order. I do not charge anybody with wrong in intentionally doing it. I say, predicating an order upon those facts, assuming they had a right to enter the order,—that it is based upon a misrepresentation of facts.

> "Third: The public interest will be best served by a wide use of the inventions covered by

said letters patent and similar rights and such wide use can be most readily promoted by the licenses which the said The Chemical Foundation, Inc., is by its charter obligated to grant."

That is a matter of opinion, too. We will probably show in this case that the general licensing of patents does not contribute to the wide use, and in any event, Congress by acts which have been in existence for almost one hundred years, by the patent laws themselves, have reached the conclusion that the development of patented articles is best promoted by exclusive use or a monopoly under the patent for seventeen years.

Now, Congress having determined that to be the fact in the United States upon what would be predicated the proposition that Congress is wrong, as to the policy in the use of patents?

"Fourth: A private sale will prevent said letters patent, trade-marks and similar rights from falling into the hands of purchasers who would be unwilling or unable to put the inventions covered thereby into use, or would use them for purely speculative purposes."

How did he reach that conclusion? Is not that true of all properties sold? What are we looking to in the sale of alien property? Are we looking to the benefit of the purchaser, or are we looking to the benefit of the trust which we are administering?

If the purpose of this situation is to look to the interest of the purchaser, as is contended by counsel and will be contended by them, as I understand, there may be some justification for this finding. I am going to point out presently the status of the trade. But we are looking to the interests of the trust; the Trustee does not consider the welfare of the purchaser; his business is to see that the trust property realizes the

most that can be realized for the benefit of the *cestui que trust* which, in this case, under the Act of Congress, was primarily the people of the United States.

"It would be impossible to make a public sale of the said letters patent, trade-marks and similar rights so as to secure the foregoing benefits to the public.

"Unnecessary expense, delay and inconvenience may be avoided by a private sale."

If your Honor please, it appears that at this time —and it has been urged in testimony before Committees of Congress and officers of the Government, and in reports of officials—the necessity for this private sale arose out of the fact that all of the persons engaged in the manufacture of chemicals and dyes or in that business in the United States were substantially all of them then stockholders of The Chemical Foundation, and had been combined into the Chemical Foundation for the purpose of making this purchase.

I venture to say that it is the first time in the history of American law or English law where the combination of possible bidders has been deliberately brought about by a trustee, or aided by him. And that is not intended as a reflection on the Alien Property Custodian, because his objects and purposes will appear in this case, and we may concede that they are of a high character. But it is the first time through a mistaken conception of the law, a trustee has ever brought about a combination of all purchasers or possible purchasers of the trust estate, and then asked authority to sell that trust estate privately because there would be no legitimate bidders to bid at a public sale.

If there is any such case has ever happened in the English or American law I cannot find it. It may be, but I do not believe there is. Because if there is any one principle that is established beyond further con-

troversy in the English and American law, it is that a trustee, whether he be the President or any other officer, in the sale of trust property or public property, must make a fair sale, and that a combination of bidders even at a judicial sale will be a ground for setting aside the sale and making it invalid.

Yet that is the basis on which this sale is predicated by Mr. Polk. I do not doubt for a minute Mr. Polk was a very busy man, and I hope nothing that I say here will be taken as a reflection in the slightest degree upon him, his ability or his purpose, because I hold no man in higher esteem in the United States. But men were busy; especially at this time when he had thrown upon him the burden of others' duties, and he could not read and consider all these factors, and if he inadvertently made a mistake in the law which is prejudicial to the people of the United States or to this trust, and the Alien Property Custodian inadvertently made a mistake, too, then the function of the Court is to correct that mistake, and that is what we are here for.

Under that order and another order issued on the 5th day of April, which is substantially in the same terms (found at page 114 of the Answer), except that it covers trade-marks, copyrights, certificates of registration thereof, etc., which are not covered by the other, these sales took place. This latter order just enlarges the character of property, and I will not read it all over, because it is the same in principle.

Under those two orders this sale took place. I have stated the law up to that point; I will go back to the facts. When I left the history of the situation we were up to the incorporation of this company, which I had reviewed. The incorporation of that company was brought about. Its Charter was drawn in New York and submitted to counsel here in this city, I think. It was brought about by co-operation between

the representatives of the Dyestuffs Institute and the representatives of the Alien Property Custodian's office. In the meantime the seizing of the patents was going on upon the list, as I have stated, made up by counsel for these different interests. Some forty-five hundred of them were first seized and arrangements were made to sell them to The Chemical Foundation, Incorporated, for the lump sum of $250,000, out of which there was to be paid, reimbursed to the Dyestuffs Institute and the members, four thousand, five thousand or six thousand dollars, or whatever it was which was paid in the seizing of patents. Subsequently sales were made bringing the patents, trade-marks, copyrights, etc., up to something like $272,800. They were sold for less than fifty dollars apiece, and it was brought up to $271,000, or practically an average of forty dollars apiece.

Those forty-five hundred patents were sold at the price which had been suggested at the Conference in January between the representatives of the Dyestuffs people and the Alien Property Custodian's office, at which the Alien Property Custodian was not present. That price was suggested before they knew the number of patents. Some said it would be one thousand, some said three thousand; they were not listed then. The evidence of various gentlemen of the Alien Property Custodian's office, including the Alien Property Custodian himself, is that the price was arbitrarily fixed. That is obvious. You could not fix the price when you did not know what you had seized or what you would convey, or what value it had. The sum of $250,000 was paid and the conveyance was made, and I want to call your Honor's attention to one provision of that conveyance. I am not going to read the whole thing, the assignments. Page 416 of the Bill, after describing patents, trade-marks, etc., states that that conveyance provides that the benefits, together with

"rights, interests and benefits under agreements issued by said A. Mitchell Palmer, as Alien Property Custodian, or by me as Alien Property Custodian without any reservation or qualification whatsoever, whether by reason of anything contained in the Charter or By-laws of the said Chemical Foundation (Inc.), or otherwise."

Mr. Polk had issued this order on the theory that the Chemical Foundation's Charter created a trust in favor of American industry, and presumably upon the theory that the United States could enforce that trust as a public trust, which I think was a wrong theory; because it did not create any trust and the United States had divested itself of all interest. It might have done it in the interest of the public, but they did not leave that open. This clause Mr. Polk so carefully put in about the trust, so far as the United States is concerned, is gone if this conveyance is valid, because the assignment says they are conveyed by Mr. Garvan as Alien Property Custodian without any reservation or qualification whatsoever, whether by reason of anything contained in the Charter or By-Laws of The Chemical Foundation, Inc., or otherwise.

In other words, nobody, neither the United States nor any person, assuming that they could have enforced this alleged trust, can ever touch the use of these things, and the Chemical Foundation, Inc., could be dissolved under the laws of Delaware tomorrow and transfer and divide this property in private ownership, and nobody in the world complain, if that assignment is valid—not a living soul. And this is done notwithstanding the fact that the authority to sell, if it existed, is predicated upon the existence of a trust.

If your Honor please, I want to go back a minute. The Alien Property Custodian in the orders and regulations for sale to which I have referred not only provided that no officer or agent of the Alien Property

Custodian should be interested in the purchase or an officer of the corporation making the purchase, but provided that it is necessary that every precaution shall be taken to enable properties to be sold fairly and for a proper price, without any possibility of favoritism or undue advantage in favor of any particular purchaser, and that the views of the Advisory Committee would be especially needed in guarding against any such possibility. Right. Absolutely, you could not sell trust property on any other condition. Then he went on and said no officer directly or indirectly connected with the corporation shall be interested in the purchase.

What happened? Mr. Palmer became Attorney General on the 4th of March, 1919, and Mr. Francis P. Garvan was appointed Alien Property Custodian in his stead, as I stated, and took office on the 4th of March, 1919. This sale was then in process of negotiation and final settlement. The order had been issued by Mr. Polk on the 26th of February, two days before the end of the month. The President was there. Why it was not conveyed I don't know; there is some reason, probably, for the delay. They had to prepare the papers. On the 8th of March, four days after Mr. Garvan took office as Alien Property Custodian, the first real meeting of the stockholders of The Chemical Foundation was called and held, and at that meeting Mr. Garvan was elected President. But the record shows and we will show here that it had been agreed some time before that he should be President. He agreed to accept that office. I have no doubt that he felt that he was performing a great public service in accepting it. He was President. Colonel Douglas I. McKay, of New York, was made Vice-President. Colonel McKay, as the record will show, was acting then as a Director in various corporations being administered by the Alien Property

and also a Director in various corporations which the Board of Directors.

The stock of the corporation, as your Honor will recall—I do not know that I stated it—had been underwritten by the Dyes Institute. The counsel for the Chemical Foundation was appointed general counsel on that day, on the 8th of March I think it was, at the same time this Board was elected, and that officer was Mr. Joseph H. Choate, Jr., who was the head of the Chemical Bureau, a part of the bureau of investigation of the Alien Property Custodian. I think I have stated it correctly; there may be some variance from a correct description. The patent counsel of the Chemical Foundation appointed that day was Mr. Ramsey Hoguet, who was the patent counsel of the Alien Property Custodian and had been practically from the beginning of the work.

So that we have the Chemical Foundation organized with the Alien Property Custodian as its President, the representatives of the Alien Property Custodian in various corporations as its Vice-President and Secretary, and those three constituting its Board, which must of course perform its functions. We have the general counsel of the Chemical Foundation Mr. Choate, who was really the chemical counsel of the Alien Property Custodian in charge of that Bureau, and we have the patent counsel of the Alien Property Custodian the patent counsel of The Chemical Foundation on the 8th of March. But, as I have already said, the Alien Property Custodian when he set up his sales organization set up an organization known as the Advisory Sales Committee, consisting of gentlemen of high character. I do not mean to reflect upon any of these gentlemen in the slightest when I outline these relationships, but they are merely facts in the case.

Those five men I have named were made the vot-

ing trustees for the common stock of The Chemical Foundation. I should have said that common stock was put into a voting stock to run until 1936. That is in the record. Those men who had to pass upon the sale and make the purchase were made the voting trustees and therefore the holders of all the common stock, and the voting power was vested exclusively in the common stock, so for voting purposes they controlled it.

So we have that set-up, in the face of the law which is as old as the English law, even the common law trustee law, whatever that may be, in the face of the law which has been declared by the Supreme Court of the United States so often that it would be a work of supererogation even to refer to it and certainly an affectation of learning to read it, that a trustee cannot be buyer and seller at the same time, and in most decisions holding that such a transaction is *ipso facto* void, and in all of them holding that such a transaction is voidable at the election of the beneficiary of the trust.

In the face of that law, in the face of the regulations established by the Alien Property Custodian himself, by authority of the President, that no person of his organization should be interested in the purchaser, we have here a purchase by a corporation every officer of which and all the stock of which, voting stock, was held by persons who were officers of the Alien Property organization, and the head of that trust organization, the Alien Property Custodian himself.

Then if the law be still the law, that a trustee cannot occupy two inconsistent positions, cannot be buyer and seller, the case ends there, because that law applies just as well to the officers of purchasing corporations as it does to a purchase by the person in his own interest. And there need not be any financial interest involved one way or the other, because it is founded

upon the deeper principle, as stated by the Supreme Court of the United States, that human nature is so constituted that the policy of the law will not permit a man occupying a fiduciary relation to become the purchaser of property sold at his own sale directly or indirectly, or through any agency, simply because the temptation is too great, and while it may often result in benefit to the trust estate, the Court cannot stop to inquire into that question.

If your Honor please, what was a proper consideration for that sale? The consideration was $250,000 for forty-five hundred patents, which these gentlemen reported and have since testified and now declare in their answer to completely control the dyestuffs and chemical industry of the United States. In other words, the Alien Property Custodian reported to the President that the dyestuffs importations into the United States are $25,000,000 a year. The business has grown beyond that. And yet he also reported at the same time that these patents in the hands of Germans completely control that industry and gave to the owner the power to throttle that industry, not only through the control of essential processes which they represented, but by a larger factor of the control of the ports of entry by product patents, to the end that no products covered by those patents could be imported, not only from Germany, but from England, France or any other country of the world.

That entire list of patents, running as Mr. Garvan has once testified, eight and a half years in the average and many of them seventeen years, were sold to this corporation, every share of stock of which except that qualifying stock was held and owned in beneficial interest by the dyestuffs interests of the United States, every officer of which was an officer making the sale, taking part in making the sale, for the pitiful sum

of forty dollars apiece, which was less than it cost to get the patent out of the Patent Office.

But, to go a little further, at the time that that sale took place there were 128 of these patents being used in the United States on a license of the Federal Trade Commission. There was a large number of contracts for patent rights under these patents which had been seized by the Alien Property Custodian. That is an alien enemy-owned contract, and contract rights are rights of royalty. There had accrued on the patents so licensed—only 128 of the forty-five hundred—and under contracts so held by the Alien Property Custodian revenues in excess of $250,000 on the day that the sale took place. Therefore, the Government of the United States through the Alien Property Custodian not only turned over this important trust property held primarily for the benefit of the people of the United States—not for the Germans—to a purchaser who was incapable of bidding because of its personnel at private sale authorized upon a misunderstanding of facts, and also turned it over for a consideration which was less than the accrued revenues upon the property.

Your Honor, I say again I recognize the confusion there is existing in this law. I recognize the difficulty that confronted the administration at this time. I recognize the high character of the men involved. But I do say that all of us make mistakes, and that if that transaction can stand as to trust property held in a sacred trust for the benefit of the people of the United States on any ground, then we have got to wipe out the law of this country in respect to trusts and open the doors to dangers such as those no man would dare to face with equanimity in the administration of a public office.

Therefore, we shall contend upon that general record and facts which will elaborate the situation as I

have undertaken to outline it and as I hope as clearly as I can to present it, that sale was absolutely void *ab initio* and if it is not void *ab initio*, at any rate it was voidable at the election of the United States, representing the people who were the beneficiaries of that trust.

There is one other aspect of this case which I now want to present briefly and then I hope I will be through.

THE COURT: If you are going to take up a new point, we are going to take a recess in three minutes.

MR. ANDERSON: I will stop here then, sir.

THE COURT: You can make your own election.

MR. ANDERSON: I would like to cut it off here, your Honor. I am nearly through.

THE COURT: Mr. Kresel, I shall permit you at the conclusion of the opening to make such opening and argument or arguments for your side as you desire. It is not my purpose to restrict either of you in your opening statements or arguments.

MR. KRESEL: Does your Honor expect to sit late enough this afternoon to enable us to finish our opening?

THE COURT: You may use your own discretion as to that Mr. Kresel.

MR. ANDERSON: I want to suggest to the Court that if it is feasible we could fix by agreement some hours that the Court will sit unless some particular circumstances arise to change it; because we are going to be under a good deal of strain here in the next few weeks, and would be glad to have some recreation.

THE COURT: I should be very glad to have counsel confer during the noon recess, which will be one hour and a quarter in length, and tell me your pleasure at the meeting this afternoon. In recent cases we have been beginning at 8.15 Standard time and taking a noon recess of an hour and a quarter at 11.45 Stand-

ard time, and making up in the afternoon I think either an hour and three-quarters or two hours, whatever is necessary to make up the five hours. I will sit earlier or later or both, at the convenience of counsel. We will take a recess until two o'clock Standard time.

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AFTER RECESS

MR. ANDERSON: If the Court please, at the time of adjournment, I had just concluded the statement of the facts as we expect to show them, and the theories for which we will contend, as applied to those facts, as to the actual sale of these patents, or the first group thereof, for the sum of $250,000.

I should say, perhaps, that the essential facts, so far as bearing upon that question, that is, the relationship of the parties, is admitted in the Answer. There is no controversy on this subject.

MR. KRESEL: Will you kindly raise your voice? It is most difficult for me to hear.

MR. ANDERSON: I have a bad throat today. Your Honor doubtlessly has noticed it; but I will do the best I can. I have not a good voice anyhow, but I will try to keep it up the best I can.

Before taking up the next main question in the case, I would like to call—I think it is due, that I should call attention to one aspect in regard to the sale which I overlooked that is, for making a fair presentation of the case, as I see it.

There were a series of assignments. After the original assignment, covering some forty-five hundred patents, copyrights and trade-marks, there were a number of small assignments, covering the period of 1919 from time to time—covering anywhere from two or three to say fifty or one hundred patents, based on a varying consideration per patent, which was in most cases about fifty dollars per patent.

I think it will appear in this case that among the patents originally assigned, or certainly at a subsequent date, were such important patent rights as salvarsan, neo salvarsan, novocain, and the Haber patents, as nitrogen and the like, substantially all of the dye patents and dyestuffs and intermediates, which are referred to in the report of the Alien Property Custodian's official document, as controlling the dye industry of the United States.

From time to time it appears and will appear in the record inquiries were made by various persons as to purchasing these patents. That is, a man would be using a patent in his business and he would ask leave to purchase that patent. In some cases he suggested that the sale should be made at private sale. A number of those instances will be brought to the attention of the Court during the presentation of the evidence; I do not want to refer to them in detail now but simply to summarize what they were.

In those instances the inquiry was often, if not generally, made of the Chemical Foundation by the Alien Property Custodian as to whether they would be interested in that patent. In some instances they had been seized and in some instances they had not. It will appear that in instances where they had not been seized an inquiry was made in a desire to purchase the patent on the part of the person using it, of the Chemical Foundation, inquiry being made whether they would be interested, and if they were, the patent was seized and conveyed to the Chemical Foundation, and the prospective purchaser was notified that he should apply to them for license.

I mention those facts and they will be introduced to show that even in those isolated cases of subsequent conveyances, where a very much larger consideration could have been realized and persons stood ready to pay a larger consideration, the Alien Property Cus-

todian conveyed the patent to The Chemical Foundation for a nominal consideration, and in some of those instances there were accrued royalties in the hands of the Government applicable to such patents, amounting to from a few thousand to many thousands of dollars—and they were conveyed for fifty dollars each.

For instance, there was one instance we will show here, where in the case of a certain patented appliance or process, or whatever it was, of a sanitary character, used by the cities for the disposition of garbage and sewage, the persons then using that patent applied for leave to purchase the same and indicated a willingness to pay a fair price. The exact amount I do not recall. The Chemical Foundation was asked if they were interested in that patent, which had no relation directly to chemicals or dyestuffs, but to sanitation. They were. The patent was conveyed to them. At that time there were accrued royalties of $27,000, on those patents—there were a number of them—and I think the price was $250 that the Chemical Foundation gave, or fifty dollars apiece, and the person using the patent offered to the Alien Property Custodian to pay, I think, $2,000 for the patent alone and to dedicate the patent to the public use of any city that desired to use it, without any royalty or charge, and take it over and use it as it had been used in the past.

The Chemical Foundation acquired the patent for $250. It immediately entered into a contract giving to this proposed purchaser and then user an exclusive contract to act as its agent in the use of that patent, charging a royalty therefor which gave it a return many times the amount that it paid for the patent, and there was then $27,000 accrued under that patent available, and they paid $250 for it.

I mention these cases, if your Honor please, as instances which we will bring to your Honor's attention as demonstrating the character of the transac-

tions and the amounts, and the utter inadequacy and ridiculous consideration which I think every one of us will admit in the light of the record of the case and in the light of the testimony—the absurd inadequacy of the matter from the standpoint of a sale. I cannot conceive that these transactions could have been made except upon a wrong theory of the law as to the duties and purposes of the Alien Property Custodian and the officers acting under that Act. I make that statement because I do not want to be understood as charging any wilful misappropriation or misuse of property of the United States. But I think the fundamental trouble here, as your Honor will find when you come to examine this situation and the evidence produced, with the authorities, which I will not state now—your Honor will find the fundamental trouble in this case is the essential difference in the theory of this law. And your Honor will be called upon to determine who is right.

We take the view that the law made the Alien Property Custodian and to the extent of his duties thereunder the President himself, as agent of the United States, trustees for the benefit primarily of the people of the United States, with the right in Congress to declare any other beneficiary that it saw fit and proper, and thereby broad powers of sale were given, as in many trust deeds and in decrees of foreclosure, for the purpose of making the property free to achieve its commercial purposes in this time when it was needed; that that power of sale was at last to be exercised by a trustee for the benefit primarily of the people of the United States and all of such other beneficiaries as Congress might in its discretion determine; that that power of sale must be exercised so as to produce a fair sale. That is, it must be made without combination of bidders, to prevent its bringing an unfair price, it must be made under the condi-

tions most favorable for the realization of the best price; it must be made upon terms most favorable to the trust, because the duty of the trustee is to look to his trust; it must be made for a consideration which at least is adequate, and it cannot be made to the trustee himself or persons interested in the execution of the trust, since under the familiar principle they cannot be both seller and buyer, and therefore incapacitated to bid. Whether they receive any benefit or consideration is immaterial.

If that view of the law is correct, these being all elements of a fair sale, then the facts which we will show and which I have indicated would seem to clearly require in the interests of the people of the United States that the sale should be set aside upon equitable grounds and an accounting had in accordance with the principles of equity.

As I understand the position of counsel upon the other side, it is that this Act contemplated originally the conservation of this property, as I have indicated, with the strictest regulations of trust, but as time developed and the war developed further information, it was the intention of Congress that the Alien Property Custodian should use his position in control of this property as an actual soldier in the war, that he should seek to destroy the interests of the Germans in American property as a part of the contests of war, and that in the end he or the President under whom he acted was given the power to use this property as they might see fit—first to eliminate the German interests in American industry, and, second, to advance and promote the interests of American industry concerned therein.

Your Honor will observe that there is therefore a distinct point of cleavage in the fundamental conceptions of this Act, which we will at the proper time argue, without direct reference to its specific terms and

the production of authorities thereon, but those two theories are incompatible, for the obvious reason that if the Trustee is clothed with the usual obligation—common law or otherwise, whatever they are, on the Trustee, whether he be the President or any other officer, his high and first duty is to look to his trust estate and the benefit of the persons interested in that trust estate, as Congress may determine; that is, the question of the conduct of the military operations of the war or commercial operations, do not concern him. They are for Congress. He is not the General Staff. He is not to determine what will win the war. He is as such trustee not to consider the interests of American industry, although that interest may be of the highest consequence, as I concede it is, and should appeal strongly to the friendly action of Congress and the Government of the United States, but his duty is that of a trustee and the policy in dealing with American industry and the policy in connection with the promotion of the welfare of American industry, and the policy with respect to the limitation of foreign elements in American industry, were all questions of national policy, which could only be determined by Congress. So long as the Government remains a Government under the control of the Legislative, Executive and Judicial organizations, the questions of policy, however important, cannot be determined by any individual or by any private corporation or any group of individuals, but only by Congress itself.

Now, following these various assignments which were made under the two orders of Mr. Polk, to which I have referred, the President returned to the United States on June 28, 1919.

It does not appear that after the President's return any order was ever issued divesting Mr. Polk of all power and authority which the President had vested in him, assuming the validity of that Act.

The record will show in this case the fact of which I think the Court will take judicial notice in any event, that the President was taken ill, on the 28th of September, 1919, and his illness, serious to himself and to the country, continued for practically the remainder of his term of office.

On February 13, 1920, there was prepared in New York, I think the record will show, by Mr. Hoguet, who, as your Honor will recall, was patent counsel both for the Alien Property Custodian and for The Chemical Foundation, an Executive order, which after having been passed upon and to some extent modified by council for the Alien Property Custodian in Washington, was sent by the Alien Property Custodian, then Mr. Garvan, to the White House, for the signature of the President.

The correspondence will be presented to your Honor, from which it will appear that this order, together with the letter of Mr. Garvan, stating that some question and doubt had arisen as to whether the former assignments under the orders of Mr. Polk were broad enough to cover rights of action and choses in action under these various patents, copyrights, and so forth, which I take it applied to the accrued royalties, and so forth, which were in the hands of the Trade Commission and of the Alien Property Custodian, under the contracts of licenses to which I have referred.

Therefore this order was presented to the President with this letter explaning that that doubt existed, and in order to remove that doubt they desired him to execute this order.

The order was sent to the President's Secretary and was sent in to the President with a personal note, asking that it be executed, and subsequently it appears that the President did execute it.

That order will be found at page 136—no, I beg your pardon.

THE COURT: Page 117?

MR. ANDERSON: Yes, page 117 of the answer. And I would like to call your Honor's attention to certain of its language.

After reciting the powers under the Act and reciting the order of December 3rd appointing Mr. Polk, and that Mr. Polk's orders had authorized the sale and conveyance to the Chemical Foundation, Incorporated, of certain choses in action, rights and interests and benefits and so forth:

"Whereas it was the intention of the said Executive orders to authorize the said Custodian to sell and convey thereunder all choses in action, rights, interests and benefits under agreements and rights and claims of every character and description, including rights to receive moneys by way of royalties or otherwise as compensation for the use of patents, trademarks or tradenames, which the Alien Property Custodian may have seized under the provisions of the "Trading with the Enemy Act" as amended, and which he had from time to time determined to relate to the objects and purposes of the said The Chemical Foundation, Inc., as expressed and defined in its charter; and

"Whereas doubt has arisen as to the authority of the said Alien Property Custodian to sell and convey to the said The Chemical Foundation, Inc., certain of the said choses in action, rights, interests, benefits under agreements, and rights and claims, including rights to receive moneys by way of royalties or otherwise, as compensation for the use of patents, trademarks or tradenames;

"Now, therefore, I, Woodrow Wilson, President of the United States of America, do hereby in the public interest, determine and order that the Alien Property Custodian is hereby authorized to sell at

private sale, without public or other advertisement, to The Chemical Foundation Incorporated, a corporation organized and existing under and by virtue of the laws of the State of Delaware, at such place and upon such terms and conditions as to the Alien Property Custodian may seem proper, all choses in action, rights, interests and benefits under agreements and rights and claims of every character and description which the Alien Property Custodian may seize or may have seized under the provisions of the 'Trading with the Enemy Act.' "

"All choses in action, rights, interests and benefits under agreements and rights and claims of every character and description which the Alien Property Custodian may seize or may have seized under the provisions of the 'Trading with the Enemy Act' and the amendments thereto now or hereafter enacted and which he from time to time shall determine relate to the objects and purposes of the said The Chemical Foundation, Inc., as expressed and defined in its charter."

There again we have the language "provisions of the 'Trading with the Enemy Act' and the amendments thereto now or hereafter enacted and which he from time to time shall determine relate to the objects and purposes of the said The Chemical Foundation, Inc."

"The Alien Property Custodian is also hereby authorized in the case of sales heretofore made by him of any property which he is hereby authorized to sell but as to which his authority to sell the same under the said Orders of February 26, 1919, and April 5, 1919, may be deemed doubtful to confirm and ratify the said sales by the execution and delivery of a suitable instruction of confirmation."

Now, I call your Honor's attention to that language. The recital in the order is that doubt has arisen—this is the reason for the order—a doubt has arisen as to whether there is authority under these orders to sell these choses in action, rights of action and accrued royalties, in brief terms; and the President authorized him to assign those things. There have now been three orders, one as to the original patent rights, the second one of Mr. Polk, to include trademarks and copyrights and so forth, contracts and applications for the same; and now the order giving to the Alien Property Custodian the further right to sell any accrued royalties, and to assign any choses in action which had arisen. Of course, under general law the right to any chose in action which arose subsequent to assignment, if the assignment is valid, goes with the property; but the question of whether the assignment of personal property carries with it any accrued rights is a very doubtful question; and this order was undoubtedly intended to cover that point.

"My reasons for the foregoing determination and order are stated in the said orders of Frank L. Polk, of the 26th of February, 1919, and the 5th of April, 1919;"—

I pointed out to your Honor this morning that the reasons stated in there, every one of them, were predicated upon a mistake of fact or were mere matters of opinion.

"And in addition thereto, the public interest will be best served by the elimination of any enemy interest adverse to American citizens arising by reason of said choses in action, or rights, interests and benefits under agreements and by the devoting of any payments made by reason of said choses in action or under said agreements by The Chemical Foundation,

Inc., to the promotion of the objects stated in its charter."

In other words, that the interests of the public would be advanced by paying over to The Chemical Foundation, Inc., the accrued royalties and amounts which had accrued under these contracts, which, as I stated this morning, I think we will show to your Honor at that time represented more than the entire purchase price paid for the patents and the other rights themselves.

Now, under that order, which was signed by the President in 1920, February 13th, the Alien Property Custodian, Mr. Garvan, on the first day of March, 1921, over a year thereafter, executed an additional assignment. I have not my hand on it. I will have it in a moment, sir.

MR. KRESEL: 180 of the Bill. (*Record, page 472.*)

MR. ANDERSON: I thought it was in the other. I have it right here. I had it laid open. That is Exhibit I in the Bill, page 180. (*Record, page 472.*)

It recites the Act and the right to seize property and the amendments to the Act, and the authorization claimed of the Alien Property Custodian to sell this property by orders of February 26th and April 5th, which are the Polk orders; and then it goes on to say:

"Pursuant to said authority vested in me, for valuable consideration, and at such places and upon such terms and conditions as to myself, as Alien Property Custodian, seemed proper, did sell to said The Chemical Foundation (Inc.), at private sale without public or other advertisement, certain of the said letters patent and other property," and so forth; and goes on to describe them. And then it lists the various assignments in their order, and goes on to state:

"Whereas it was the intention of myself as Alien Property Custodian and of said The Chemical Foun-

dation (Inc.), in agreeing upon the said sales and in executing, delivering and receiving the said assignments, that the said assignments should assign and convey to said The Chemical Foundation (Inc.), not only the letters patent and other property specifically referred to in and assigned by the said assignments, but also with such exceptions as are specifically stated in said assignments, all rights, claims, demands, interests and choses in action of every character and description acquired by the Alien Property Custodian by virtue of the seizures whereby the said letters patent and other property were seized; and

"Whereas doubt has arisen as to whether the language of the said assignments is in fact and in law sufficient and effectual to carry out the true intent and purpose aforesaid of the said sales and to assign and convey to said The Chemical Foundation (Inc.) all of the said rights, claims, demands, interests and choses in action acquired by the Alien Property Custodian as aforesaid; and

"Whereas doubt has arisen as to the authority of the Alien Property Custodian to sell and convey to the said The Chemical Foundation (Inc.) certain of the said choses in action, rights, interests, benefits under agreements and rights and claims including rights to receive moneys by way of royalties or otherwise, as compensation for the use of patents, trademarks or trade-names; and

"Whereas in one of the above-mentioned Executive orders, the same being dated February 13, 1920, among other things it is recited that it was the intention of the above-mentioned orders"—it recited the Executive orders—I need not read that. And

"Whereas the Alien Property Custodian is authorized by said Executive order dated February 13, 1920, to sell at private sale, without public or other advertisement, to said The Chemical Foundation (Inc.)

at such place and upon such terms and conditions as to the Alien Property Custodian may seem proper, all choses in action, rights, interests and benefits under agreements and rights and claims of every character and description which the Alien Property Custodian may seize or may have seized under the provision of the 'Tradng with the Enemy Act' and the amendments thereto, then or thereafter enacted and which he from time to time shall determine relate to the objects and purposes of the said The Chemical Foundation (Inc.), as expressed and defined in its charter; and

"Whereas the Alien Property Custodian is also authorized by said Executive order dated February 13, 1920, in case of sales theretofore made by him of any property which he is authorized to sell by virtue of said Executive order dated February 13, 1920, but as to which his authority to sell the same under the said orders of February 26, 1919, and April 5, 1919, may be deemed doubtful to confirm and ratify the said sales by the execution and delivery of a suitable instrument of confirmation:

"Now, therefore, I, Francis P. Garvan, as Alien Property Custodian, by virtue of the authority conferred upon me by said 'Trading with the Enemy Act,' as amended, and by the Executive orders, orders and proclamations issued in pursuance thereof and hereby for the purpose of effectuating the true intent of the parties to said assignments, confirm and ratify the sale and assignment to said The Chemical Foundation (Inc.), of, and do hereby for valuable consideration heretofore received by me, sell, assign, transfer and set over to said The Chemical Foundation (Inc.), all property, including (but not thereby limiting the generality of the foregoing) letters patent, rights under letters patent, applications for letters patent and rights thereunder, copyrights, rights under copyrights, certificates of registrations thereof, the publications upon

which such registrations were granted, trade-marks, rights under trade-marks, together with the good will and business pertaining thereto, including all profits and damages recoverable at law or in equity for past infringement with respect to any and all of the foregoing, choses in action, rights, interests and benefits under agreements, and rights and claims of every character and description with respect to all of the foregoing, seized by me as Alien Property Custodian, or by my predecessor in such office specially referred to in and assigned by said assignments, and I do hereby confirm and ratify the sale and assignment of and do hereby sell, assign, transfer and set over to said The Chemical Foundation (Inc.) all choses in action, rights, interests and benefits under agreements, and rights and claims of every character and description growing out of and appurtenant to the ownership of said property, including (but not thereby limiting the generality of the foregoing) rights to receive moneys by way of royalties or otherwise as compensation for the use of patents, copyrights and trade-marks, and all right, title and interest in and to the choses in action and the funds referred to in Section 10, subsection (f) of the 'Trading with the Enemy Act,' as amended, acquired by the Alien Property Custodian by virtue of the seizures by which there were seized patents, copyrights or trade-marks, under which a license had theretofore been granted in accordance with the provisions of Section 10, subsection (c) of said act, as amended, all of which property I, as Alien Property Custodian, from time to time have determined and do hereby determine to relate to the objects and purposes of said the Chemical Foundation (Inc.), as expressed and defined in its charter; the intent and purpose of this instrument being to vest in said The Chemical Foundation (Inc.) every right,

title, interest, claim and demand, save such as are specifically excepted in and by the said assignments, acquired by the Alien Property Custodian by virtue of the seizures whereby the said property was seized."

Now, if your Honor please, we shall contend in the first place that the orders of Mr. Polk, being void in the first instance, cannot be ratified so as to make them effective, and no act done thereunder is valid, since a void act cannot be made valid by ratification.

In the second place, we shall contend that the order of th President of February 13, 1920, was obviously predicated upon a want of knowledge of the actual facts, and a mistake as to the actual facts and rights with respect to The Chemical Foundation.

We shall further contend in that connection that the order of the President did not seek to ratify the acts of Mr. Polk, but only undertook to authorize the extension of the conveyance to embrace the accrued royalties and choses in action attached to the patents and patent rights at the time that they were sold, and by its terms it was expressly limited with respect to ratification to the rights authorized to be sold by that order.

That this instrument of ratification executed by Mr. Garvan was without a scintilla of consideration in so far at least as it sought to convey property not conveyed by the original assignments, and that the original assignments, having been made for a consideration of approximately fifty dollars a patent, or copyright, or whatever it was, and there having been then in the hands of the Trade Commission, under this subsection 10, which is not referred to in the President's order, you will notice—under section 10, there then being approximately $150,000 in the hands of the Trade Commission, and approximately as much more —I do not mean to say the actual amount—accrued under the contracts held by the Alien Property Cus-

todian and seized as enemy contracts which had accrued at the time that the effort to make the conveyance took place, that there was a deliberate—I do not mean to use the word "deliberate" in any wrongful sense—but there was a deliberate turnover of approximately $300,000 of money in the Treasury of the United States, or where it would go into the Treasury of the United States, for the benefit of the people of the United States, or as Congress might direct—turn it over to this corporation without one cent of consideration of any kind for it; and that the Alien Property Custodian found as a fact that that money related to the purposes and objects of The Chemical Foundation; I have not a doubt that it did, because money relates to the purposes and objects of all corporations and persons as well. In that sense it undoubtedly related to it, but it had no relation to it in any other respect.

Upon that state of facts, accumulating step by step, the series of events, in an assignment very much broader in its terms than anything contained in the Presidential Order, an effort to ratify, not the things authorized by the Presidential Order, the choses in action or rights to royalty, but to ratify all sales made a year or more before the Presidential Order was entered, an assignment made just before the termination of the administration—that that cannot stand as a conveyance of property of the United States to a private corporation no matter what may be the benefits to American industry or any other private interests.

Your Honor will observe, therefore, that this transaction, aside from the general principles applicable to sales by trustees, which principles of law, of course, are familiar to the Court and to us all, is founded first upon the vesting in Mr. Polk as an individual of an authority which Congress required should be exercised by the President personally; that

Mr. Polk's act, in our contemplation of law, and assignments thereunder were void; that the President did not undertake to ratify those acts and that he could not ratify in any event acts which were void, or which he as trustee for the American people could not have authorized to be done under the circumstances of this case, even if he had personally done it; and that the final so-called ratification assignment is very much broader than that of the Order of the President, and that the whole transaction is therefore void as matter of law and cannot be sustained. This is aside from the question of the sale by a trustee to himself.

The other aspect of this case which we will present will involve bringing in quite a good deal of evidence, perhaps. So far I have been discussing this matter practically on the facts which are matters of record. I have already pointed out the want of adequate consideration owing to the fact that there accumulated in the hands of the Government, or accrued at least, more than the entire consideration paid at the time it was turned over. But the facts further show that The Chemical Foundation, although it has only issued 422 licenses, including those I understand issued by the Federal Trade Commission, has collected by various sources up to the first of last January—I think the amount aggregates about $700,000, and of that amount several hundred thousand dollars is money collected at the ports through the exercise of the alleged rights under these patents to prevent importation from any foreign country of the products which they cover.

Therefore, it would seem to require no testimony as to value of the patents to demonstrate beyond any controversy that if our theory is right, the property must be sold as trust property for fair consideration and under fair terms, with these accumulated funds turned over as a gift to The Chemical Foundation,

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aggregating more than the entire purchase price, with such patents as Salvarsan, Neo-Salvarsan and Novocain, to say nothing of the dye patents included in the sale at $50 apiece, their value being a matter of common knowledge, and with dye patents giving, according to the reports of the Alien Property Custodian and the statements of the President of The Chemical Foundation himself, the complete control of the dye industry of the United States, amounting to over twenty-five million dollars a year in business—I say it should require no argument, and certainly no evidence beyond that, if the principles for which we contend are sound, that the sale was not for an adequate but for only a nominal consideration, and however good and high may be the purposes and however beneficial they may have been to the industry of the United States, upon the suit of the United States as trustee for all its people, the transaction must be set aside and the parties restored to their original rights as far as practicable.

There is one other reason for that action. Assuming that this is true and leaving aside for a moment the whole question of the sale by the Trustee, it is our contention and will be our contention in this case that the transactions here involved constituted a confiscation of this property which the President himself did not have the power to make and which could only be made by Congress. Therefore whatever may have been the effort on the part of the President or any one else, whatever may have been the good faith, and their sublime confidence in the high purpose and benefits of the Act, it was a violation of the fundamental laws of this country and cannot stand.

Upon what facts will that theory be predicated? Many of them have already been stated to your Honor. It is contended in the answer and apparently one of the strongest theories of this case on behalf of the

defendant, that the defendant as a part of the consideration for this sale, gave to the United States the license to use these patents free of all charge, or such of them as were useful to the Government.

It will be shown here no doubt that certain licenses have been issued in fact to the United States for the use of these patents during the year of 1921 and that those licenses were issued without consideration at all or for nominal consideration. It will further be shown, no doubt, that the United States has been released by The Chemical Foundation as the owner of these patents from all claims for past infringement during the war or otherwise. It will also be shown that the licenses issued by The Chemical Foundation were non-exclusive licenses required by the charter so to be, subject always to the right of the Board of Directors to determine who should be licensees and who should not. The license might be non-exclusive in terms, but exclusive in fact, if it only licensed one person, and the Board had absolute discretion on that subject.

Therefore, it would be contended that all of these benefits to the American people or American industry, as they call it, and to the Government itself, through these licenses, were benefits which constituted a valuable consideration to the Government and should be taken into consideration in sustaining this transaction, they say. I hope I state their position fairly. I think that is fairly drawn from their pleadings.

The Alien Property Custodian was the trustee. Let us take these elements up in their order. Suppose I was trustee for a piece of property on the outskirts of Wilmington worth $100,000, and I believed in the public interest that property would be enormously valuable to everybody concerned if I could dedicate it to a public park, and therefore I dedicated it for a public park or dedicated it with certain rights and easements to the public thereon—the right to main-

tain a lake on it, we will say, and to go back and forth on that lake, and a place of amusement for children, or to build upon it some institution like a hospital, a children's hospital for the saving of the lives of children, a cause which appeals to us all as the greatest benefit to mankind; and then having put that hospital on it or dedicated it to the public use, as the case might be, I undertook, as trustee, to sell it to somebody, and because instead of getting one hundred thousand dollars for it I only got ten thousand, and that was a fair value for it subject to the easements which had thus been created, would any Court of Equity in the world relieve me of the obligation to account for the full value of the property? And would it be set aside in the event that I undertook to join in the purchase myself, or to be the head of the hospital institution and buy on its behalf the interest which I had given? Would there be any question in that case that if that act were sustained, I would have confiscated for the public use nine-tenths of the value of that property; and can that be justified under any known law of the United States, no matter how great the benefit?

Take another instance. Suppose, for instance, that I had accrued on that property a large amount, on some property in my hands as trustee, a large amount of rights and choses in action against somebody, resulting from past use, which I could collect, and suppose I should say that the development of this community of Wilmington will be greatly aided, and every man will be aided to the extent of $2.00 for every dollar that it will cost to this community, therefore I will yield all these past rights in this property to that person for the benefit of the public. Can there be any question but that would be an invalid transaction on my part as trustee?

Or, if the Government came in and undertook to take those accrued benefits for the benefit of the people of the United States, would that be a confiscation of property in violation of the fifth amendment and the decisions of the Supreme Court? I am not arguing that it is not of enormous benefit to the industry of the United States to give them a right to use these patents. I am not arguing at all, and I am not going to argue that the conferring of these rights upon a corporation or anybody else for the benefit of a certain class of industry may not develop that industry and in the end make America even more of a self-sustaining unit than it is today, and provide for its material advancement. But I am arguing and I stand here to uphold that proposition to the end—that if this thing is to be done even as a war act, it can only be done by Act of Congress clearly declaring that purpose; that if it is not to be done as a war act, it cannot be done at all except for just compensation.

Let us see. The Supreme Court has held that this was a war measure, founded upon the power of Congress to make rules for captures on land and sea, based on the Constitution and on that alone. Where do we stand? Congress passed an act and every section of it indicates that it was an act of conservation and not an act of confiscation. It provided for the right to come in under Section 9 if the property was wrongfully seized and recover it. It provided for continued use of patents under licenses under Section 10. It provided for various uses of enemy property throughout the act, which I am not going into in detail, which are utterly and wholly inconsistent with any idea of confiscation; but to remove that from all possible doubt Congress finally declared that any claim to this property or the proceeds thereof should be settled after the war as Congress might determine.

It reserved absolutely the power of final disposition. And to show its construction, it has not only by amendments to the Act returned property of persons who were alien enemies at the time that their properties were seized, but are now members of States which have been created and are now friendly to the United States, but it has gone further and returned all property under $10,000 in value and income of less than $10,000. Whether that is wise or unwise, I am not called upon to consider, nor is this Court, I respectfully submit. It is within the discretion of Congress. But until it does exercise that discretion under the Treaty of Berlin and the Treaty of Vienna, this property is held for the benefit of the people of the United States, with the power in Congress to finally determine its disposition.

But we will be told, no doubt, that under the amendment to Section 7 providing that the sole remedy of the owner should be against the proceeds, and the amendment giving the President the power to sell, that in effect was an act of confiscation. Let us see. The President's power is limited to four things. When he finds it in the public interest and so determines, and states his reason therefor, to substitute a private for public sale, to substitute a private sale without advertisement for advertisement, to advertise if he desires at some place other than where the property is located, and, if need be, to sell to others than citizens of the United States. Those are the four things that are required and those are the four things as to which the President is given power. But always it is a sale—there is not a suggestion of anything else; always there is a sale by a trustee, because the same section provides that the Alien Property Custodian is a trustee, and, of course, the terms of the act make him a trustee whether it says so or not. The power of sale is vested in him.

Therefore, the exercise of the discretion excepting it from the general and universal rule of the sale of public property merely applies to the method of the sale and not the sale itself. In the last analysis it must be a sale under fair terms and for a fair consideration, or it is invalid, whether done by the authority of the President or any one else, because the Courts have held without question that the public property of the United States cannot be given away or sacrificed unduly by any office of the Government, however high.

Therefore, that it is not intended to authorize a confiscation—clearly not. Every Court that has passed upon this question, that has considered the nature of the Act with relation to confiscation, as I shall point out to your Honor when I come to argue this case, has held without exception that this Act is an Act of conservation, seizure and sequestration, and not an Act of confiscation. They have also held, and since the case of Brown versus United States in 8 Cranch. is no longer open in this country, in an opinion by Mr. Chief Justice Marshall which reviewed the whole question of the confiscation of property seized on land in time of war—that while the power to confiscate did exist in the Government of the United States—a doctrine which is seriously questioned now by very able publicists, but which, of course, we take as correct—yet that power could not be exercised by anybody but Congress, and a declaration of war did not declare an intention to confiscate, did not operate to confiscate, but that an express declaration of Congress was essential to that end.

The same theory was followed during the Civil War in cases where Congress did confiscate by proceedings in *rem* property in the Southern States which were then in rebellion. And so all the way through; the Courts and the decisions on this Act itself, with-

out exception, have held what is obvious from a reading of the Act, that it is not an act of confiscation.

Yet we have here the serious contention that a private corporation can take over this property for a nominal consideration with an accrued revenue on it of more than the amount of the consideration paid, and therefore take it over for nothing, as a gift, controlling as it does, one of the largest industries in America, with a large earning power even under the limited and restricted conditions of the sale—take that property, release to the United States all claims for past infringement, license the United States without compensation, and then license any other person who desires to use it in the discretion of the Board for what they see fit, and under those circumstances in effect to confiscate this property to a private corporation for the benefit of American industry, and do that by an act of an officer of the Government under executive order, under an Act which contemplated its conservation and sequestration and handling in accordance with the principles of trust.

I say with all possible deference to the distinguished officers involved in this transaction, from the President down, that that cannot be done so long as the laws of the United States prevail.

However high may have been the purpose and however beneficent it may have been, I say again, the fact is that it cannot be done, and it is the duty of the United States to set aside such a transaction.

We will present certain facts going to the question of the value of the property—not very elaborate, I hope—upon which we will predicate the argument as to compensation.

I should have said that there is one other factor in this situation which must be considered—that this property was sold for a lump sum, a total amount. There were 4800 patents here owned originally by

numerous persons and held by the United States as individual trusts, taken from different persons, with the right of Congress to return them to the persons. Therefore, there was that trust relationship in them. One of the grounds upon which a Court will set aside a sale is that the property has been sold as a mass when it should have been sold separately, and when to sell it as a mass would not be to the best interests of the owner or the trust estate. As a matter of fact, this property was sold for $250,000, and it has never been allocated, and never has been allocated to any patent on the books of the Alien Property Custodian. Therefore, a patent such as Salvarsan, worth, we will say, anywhere from $100,000 to a million dollars—I am not discussing values now, but certainly very valuable, and the exhibits filed with the answer show its value—or Novocain, or the control of the dyestuffs industry through the patents and processes they have, worth very large sums of money, are not segregated from patents which had no value whatever, if that may be the case, and the result is that a man with a property in trust worth half a million dollars is given just fifty dollars, while the man with the property of no value is given the same fifty dollars. That is confiscation of property, there is not any question about that. Therefore, it is another factor which would make it impossible, as I see it, for this Court to sustain this transaction.

I have thus, if your Honor please, reviewed what seemed to me to be the main issues in this case. It appears and is charged in the Bill that this corporation has wasted its assets in propaganda and other things of like character, large expenditures of its revenue, so that it is practically unable to respond to a decree should one be entered requiring return of this property and an accounting for the proceeds thereof in accordance with the prayer of the Bill. It will

be contended here that the Government has been guilty of undue delay in bringing this suit, and that the Government has not tendered back the consideration paid for the patents of $271,000.

I want to say just a word about both of those contentions, and that is this: In so far as the last is concerned, I think there are abundant authorities to the effect that you do not have to tender back the consideration in a case of this kind, where you submit the rights of the respective parties to a Court of Equity and the consideration is available to respond to its decree. Where the property also is in the hands of a defendant and the Court in shaping its decree can protect the defendant, give the defendant any protection that is equitable and just in the light of the facts as they may be developed, there is no reason why that tender should be made. In the next place, the prayer of the Bill is that the accounting shall be agreeable to the principles of equity. If, therefore, it should appear that the defendant is entitled to credit for the amount of the purchase price, the Court can shape its decree accordingly and the credit will be given.

In the second place, it is contended that there has been great delay, and it will be shown to your Honor that until March, 1921, the control of this office was in the hands of the Alien Property Custodian, who made the conveyance and who was President of The Chemical Foundation; that this suit was brought in the summer of 1922. The reasons for the delay are stated in the Bill, and in any event laches does not run against the Government and neglect of its officers, even if it existed, cannot prejudice its rights. That is too well settled to need discussion.

In the third place, it is contended that the rights of certain parties as licensees have attached under these licenses of The Chemical Foundation and that it

would be unjust to disturb the situation at this time. The Answer is that any person taking property conveyed or assigned by the Government of the United States takes with notice of the powers and the duties and the obligations of the agents of the Government and the limitations upon their powers. But in any event, in order to remove any possibility of wrong being done to any licensee, the prayer of this Bill contains the unusual provision that at the proper stage the Court will permit any licensee to intervene in this suit, set up his claim as a licensee, have a Court pass upon it, and render such decree as to those claims and licenses as may be equitable and just. The Government therefore invites the intervention of these licensees at the proper time to the end that nobody may be prejudiced and that nobody may be wronged.

The Answer in this case sets forth a long so-called third defense, and with a few remarks about that I will conclude this unusually long statement. In effect that third defense sets up the history of the war, the development of German industry, the control of the Germans over the dyestuffs business, the fact that the control of these patents allowed them to control the American dyestuffs industry and prevented the development of the industry in the United States, the necessity to the industry of the United States for its development, both from an industrial standpoint and as a matter of public defense, that the purpose of this whole transaction from beginning to end was to eliminate the German interest from American industry and to develop and improve the dyestuffs and chemical industry of the United States, with immense benefit to this country and to its safety, and then that under the licenses which have been issued by The Chemical Foundation since this thing started, the dyestuffs industry had developed to a point where it now sup-

plied 90 per cent of the dyestuffs and ingredients of that character needed for the markets of the United States, is prosperous and growing, and would be injured if this transaction were set aside.

It further shows the purpose of this transaction was to control and prevent the importation from Germany, as well as other countries, by the control of the product patent, and to enable dyestuff people under this license to manufacture the essential ingredients in this country for the development of that business. If your Honor please, I am in thorough sympathy with all of the legitimate aims which have thus been expressed. I believe that the development of industrial interests of the United States is important. I believe in the development of this chemical industry,—since the future civilization of the world will largely depend upon the application of chemical principles, under natural law to industrial elements,—that this development is a matter of the greatest importance to the United States, and to its preparation for national defense; but I conceive that no one will seriously argue that this is a question which may be determined by Congress, and must be determined by Congress.

Congress has recently, after urgent solicitation of these very gentlemen, refused an embargo in the interests of that industry. They have thus undertaken to establish an embargo, by the use of these patents, in direct conflict with the policy which Congress has seen fit to establish. There can not be two legislative bodies in the United States—there must be one; and while Congress may be unwise in its refusal to afford the protection which this industry asks, it is not the province of an individual, or officers of the Government, or of the industry itself, or private corporations, to take public property, held by the Government in trust, and through the use of that property, to accom-

plish that which Congress might refuse to sanction, or to fix or determine a national policy.

Therefore, while I sympathize with all of these objects, it seems to me that they are entirely irrelevant to this case. We made a motion to strike out that part of the defense, that it might shorten the trial. It is a matter largely of indifference, unless it would shorten the trial, because it is our desire, and the desire of the Government, that all the facts which the Court may think may have any bearing, however remote, upon this transaction, shall be brought to the attention of the Court, to the end that justice may be done once and for all, and this question may be determined once and for all by the Courts. But in any event, I fail to see where there can be the slightest bearing upon the issues which I have outlined in this case. Assuming the motives which actuated these gentlemen in this transaction to be of the highest, or the benefits which may accrue to American industry from this transaction to be great, yet since it was not within the contemplation of the law or the Alien Property Act, or Congress, that such a transaction should be performed for the benefit of American industry, it cannot be lawfully or validly done.

Someone has said that the question in this case is a question of German or American. If your Honor please, I do not think that question has anything whatever to do with it. The Government of the United States is representative of all the people of the United States, and this suit was brought by direction of the President of the United States, personally, as the record will show in this case, in the discharge, we must assume at least, of his conception of his duty to the people of the United States.

If this property is returned to the Government and its proceeds accounted for, it will remain in the hands of the Government until Congress acts, with the

power on the part of the Government to allow the industry to use it, just as fully as a private corporation can allow the industry to use it.

If Congress should see fit, it can confiscate every one of these patents to the Government of the United States for the public use, and let anybody use them. If it sees fit, it may amend the Patent Law, or it may return them or not, on such conditions as it may impose. But all of these are matters which are within the Congressional discretion. As it stands today, these patents are the right on the part of the owner to maintain a monopoly in the production of his product, or against the importation of his product. Congress has declared that monopoly to exist to be in the public interest, and that monopoly cannot be destroyed, arising from that patent, by virtue of any private action, without confiscating the private right arising therefrom, and Congress alone can do that. The Answer says:

"It is believed that the country will prosper in this industry and be ready, not only to serve its dye industry, which is vital, but to build up a large export business for the benefit of the world." When I read that part of the Answer, which is summarized, I was reminded of a little incident in my own experience. In the winter of 1918, the President of the United States wrote a message to the Pope of Rome, stating America's object in this war, and why it could not then enter into negotiations for peace. Probably the spirit of American civilization, and the spirit of the American people had never been better stated than in that letter.

At that time I happened to be in the western edge of Russia—Rumania. The country was desolate. It was dissolving under the forces of the Russian Revolution. Whole villages were being wiped out by star-

vation and disease and by war—ruthless, bitter war. When that message came by wireless—the only way it could reach us—that whole country seemed to take in a breath of new life. At last someone had interpreted the aspirations, and expressed the longing in the hearts of the great toiling, suffering masses of the world. In every place in Rumania, every village which I passed through, they had made American flags. They did not have any cloth. They made the flags of paper; they painted them on wood, and not knowing the American flag, sometimes they had 72 stars, sometimes they had 30 stars, sometimes too many stripes—at least it was the American flag. Why? Not because America had great reserves of soldiers. It had been in the war for nearly a year and those flags had not appeared. Not because of its immense commercial strength and its great and growing industry or the fact that it would be an essential and controlling factor in winning the war,—not for all these things, they had long known,—and there had been no such popular response among these far-off people, many of whom did not know where America was. It was because the President had voiced the spirit of American civilization. He had interpreted its ideals, and had given to the world, in concrete formula, a new ideal toward which mankind could strive, with hope of its ultimate attainment.

The President said, America does not seek any selfish gain out of this war. It does not seek any advantage. It will not take any advantage. It does not seek any enlargement of its power, political or otherwise. It does not seek wealth. It does not seek commercial strength. It seeks only justice, and that the world may be established upon the basis of right,—the right of the weak to live and of mankind to know freedom in the true sense of that word.

And his voice reached out to this far-off coun-

try, not because he spoke for a great people, in number, in size, and in resources, but because he voiced the heart of the civilization of America.

Turn from that ideal to this. The whole excuse for this transaction, the whole explanation, is founded on two theories: The first is destruction after the war is over (because the war was over when all this was done) of the alien interest; and the second the development of the commercial interest of America. While I recognize the importance of that interest, I hope that the future may read the history and ideals of my country not in transactions of this character, however much they may mean to its commercial wealth; but that the people from afar looking to America, as well as its own people, may see that the war is over, that hatred can not be the basis of peace, and above all, that when they look to this country they may not see alone its tall buildings, and its great commercial resources, for it is too great to rest upon such a shifting foundation, but shall see over above all this material strength the spirit of America, as expressed by the President, and realize that America is great, because America is just.

It is in that spirit that we shall present this case to this Court; not in any criticism of anyone; not in the abuse of anyone; but simply with the hope that justice, whatever justice may be in accordance with the highest ideals of national and international right, may prevail.

THE COURT: Colonel Anderson, just for the purpose of enlightening me on one or two words, not at all in criticism if I understand you correctly, fraud will develop, and necessarily develop in the progress of the case or the trial of the case or in the decision of the case; is or is not that inevitable?

MR. ANDERSON: Fraud in law, yes, sir. Fraud in fact—I hope not.

THE COURT: I understand that distinction. Now

then, will that fraud in law—I am just asking this for future enlightenment and guidance in the trial of the cause—in your conception of the case not fall upon the individuals who are connected with the Alien Property Custodian's office at the time of this transaction, or with those interested in the Chemical Foundation, the defendant in this cause?

MR. ANDERSON: I might answer briefly to some extent, both. Of course the legal—I say wrong in a strictly legal sense of a sale by the Alien Property Custodian to the Corporation of which he and his officers were in control—would be purely a fraud in law so-called, and not involve any moral turpitude at all, and that would be as far as necessary to inquire; but in this aspect—those who co-operated or induced this action as alleged in the Bill might be held to be guilty also of a wrong in combining to purchase this property, and in seeking to bring about its sale for the purposes set forth in the Bill and in the manner set forth in the Bill—

THE COURT: And inducing—

MR. ANDERSON: The officers of the Government to execute these instruments—

THE COURT: And under your theory they are guilty of a breach of trust—

MR. ANDERSON: They are guilty of a breach of trust, that might be called an actual fraud, and yet men may do it without thinking of what it amounted to, and I do not want to bring that element in any more than necessary.

THE COURT: I only want to understand your theory of the case on that point.

MR. ANDERSON: Yes, I think that is so. I thank you.

MR. KRESEL: If your Honor please, in view of the lateness, and my desire to finish the opening for the defendant without interruption, I should like to

ask your Honor's indulgence and let the case stand over now until tomorrow morning. It must be quite evident to your Honor that it will take counsel for the defense more than half an hour or an hour to deal with this case.

THE COURT: You may have your option to go on now and stop at a quarter of three by that clock, or begin now and stop when you are through, whether that is six o'clock by that clock or not, or you may begin afresh in the morning at 9:15, whichever you prefer.

MR. KRESEL: I should prefer, if your Honor will permit me, to begin in the morning.

THE COURT: Adjourned to tomorrow morning, 8:30 o'clock, standard time.

(Whereupon, at 2:30 P. M., standard time, the case was adjourned until Tuesday morning, June 5, 1923, at 8:30 o'clock Standard time.)

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## SECOND DAY.

Wilmington, Delaware,
June 5th, 1923, at 9:30 o'clock a. m.

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*Before:*

HON. HUGH M. MORRIS, U. S. District Judge.

*Appearances:*

as before.

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OPENING BY MR. KRESEL ON BEHALF OF THE DEFENDANT.

MR. KRESEL: If your Honor please, at the outset of my statement, which, while I shall endeavor to make it as short as possible, must under the circumstances be rather lengthy, I think I voice the sentiments of all my associates in this case when I say

that the opening statement made yesterday on behalf of the Government was one of the clearest and most dignified statements heard in a Court of law.

When counsel are prone not only to over-estimate the strength of their case but also to take opportunity to reflect upon the motives and the purposes of those opposed to them, it was indeed refreshing to hear the Government state that those who are responsible for the transaction now under review by your Honor were actuated by no selfish or base motives, that they were patriots, though mistaken patriots and that no fraud is charged against the President, Mr. Polk and the other officers of the Government who are concerned in this transaction.

The Colonel said that perhaps fraud in law might be spelled out. We as lawyers understand the distinction between fraud in law and fraud in fact. I think the Colonel would desire to have it made perfectly plain that the Government charges against the President, Mr. Polk and the other officers of the Government no fraud whatsoever. Indeed, your Honor has read the Bill of Complaint and your Honor can see that there is no charge of fraud either in law or in fact contained in that Bill as against the President and the other officers of the Government.

Your Honor asked Colonel Anderson the direct question whether there was a claim that fraud had been committed, and he stated that insofar as the persons who are said to have induced the action by the Government officials were concerned, fraud is claimed in law at least, and he hoped not in fact.

Now, the Government's opening, admirable as it was, was to our mind incomplete in many essential details.

In our view, this case involves much more than the mere question as to whether the Government shall be permitted to repossess itself of the patents

involved. Were that the only question in this case, or even the most important one, the Government in its Bill would not have charged as it does, the entire chemical industry of this country with a conspiracy to perpetuate a monopoly and incidentally to defraud the Government. And may I say in passing, that it was significant that throughout the Colonel's statement and argument yesterday, he never once mentioned the word "conspiracy." Yet your Honor will read this complaint, and you will find it expressly charges that certain persons and corporations named, and others not named, had entered into a conspiracy to do certain things which I shall discuss in a minute.

Now, whether these charges of conspiracy are mere inducements, as the Government claims, or whether they are in fact of the essence of the complaint, they are serious charges, and they throw into bold relief the indisputable fact that this is a controversy not simply between the Government and The Chemical Foundation, but between the Government and the chemical industry of the country. Nor, as we see it, your Honor, is the Government the only plaintiff in this case. True on the face of the Bill, the United States Government appears as sole plaintiff, but we shall show your Honor that there is here an invisible plaintiff, in the person of the great German Chemical Trust, the so-called Interessen Gemeinschaft, otherwise known as the "I. G.," and it was certainly fitting and proper that the first witness sworn in this case should have been the representative and the spokesman of the great I. G. I say to your Honor that in the last analysis it will be found that the controversy here is between that Government controlled monopolistic German chemical trust and the chemical industry of this country.

The charge is made that certain named chemical concerns in this country and others not named, hav-

ing obtained a monopoly of the chemical industry of the country, desiring to perpetuate that monopoly, but fearing that after the war, the Germans by means of certain United States patents owned by them, could destroy that monopoly, entered into a threefold conspiracy, namely: First, to induce the Alien Property Custodian to seize those German patents; secondly, to organize this defendant, The Chemical Foundation, and to control it and to use it as an instrument to perpetuate that monopoly; and thirdly, to induce the President and the other Government officers to sell these German patents so seized, to the defendant, The Chemical Foundation. And it is charged that that conspiracy was successful, that by means of false representations, concealment of essential facts and deceit, the Alien Property Custodian was induced to seize these German patents and to sell them to the defendant, The Chemical Foundation; and it is charged that the sale was made for a consideration so inadequate as to shock the conscience of a Court of Equity.

Now, we shall show your Honor that this sale was made under the express direction of the President of the United States, acting through Mr. Polk, the Under Secretary of State, and that thereafter the President, over his own signature, ratified and confirmed that sale. The other persons concerned in this sale were A. Mitchell Palmer, the Alien Property Custodian, and later Attorney General of the United States; Francis P. Garvan, who was the Director of the Bureau of Investigation in the office of the Alien Property Custodian under Mr. Palmer, and his successor in the office of Alien Property Custodian; Mr. Joseph H. Choate, who, during the war volunteered his services to the Alien Property Custodian and was one of those despised dollar-a-year men, and who, while in that office, had particular

charge of the investigation of German-owned chemical industries in this country, and Ramsey Hoguet, one of the best known patent attorneys in the country, who, during the war did patent work for the Alien Property Custodian.

Now, as I say, the Complaint does not charge the President and these officers with fraud; but the charge is that facts were misrepresented to them, that they were deceived, and that facts were concealed from them. Now, a decent respect for the high office of President, even though the incumbent be of a political faith opposed to those who are responsible for this charge, would have dictated the expediency, if not the legal necessity, of setting forth the particulars, the facts, that were concealed from the President; the manner in which he was deceived, and the names of the persons who are responsible for that deceit. You would have thought that those who had the temerity to charge Woodrow Wilson with having permitted himself to be duped into a sale, which, according to the Bill of Complaint amounts to a fraud upon the Government, and a violation of a sacred trust, would have seen the wisdom, if not the fairness, of stating the facts upon which such a serious charge is based. But your Honor will read this long Complaint from beginning to end without finding an allegation of a single fact to support that charge.

There are two paragraphs in this Complaint, one of which makes the allegation of deceit of the President and the other the allegation of deceit and concealment from Mr. Polk. With your Honor's permission I shall read to you those two paragraphs. I read first the Thirty-fifth Paragraph of the Complaint. I do not read from the beginning thereof, because that statement is mere inducement; but the charge of deceit is as follows:

"Complainant is informed, believes, and therefore avers and charges, that said Executive order"

That refers to the confirmatory order by the President of February 13th, 1920—

"was prepared by or at the instance or procurement of said defendant, the Chemical Foundation, Incorporated, at the instance or procurement of said persons, firms and corporations in control of said dyestuffs and chemical industry and parties to said scheme or conspiracy hereinbefore set forth."

And when your Honor goes back to the paragraph of the Complaint which charges that conspiracy, your Honor will find that the allegation is made that The Allied Chemical and Dye Company and the duPonts and others whose names are not given entered into that alleged conspiracy:

"That the facts hereinbefore set forth and other necessary and essential in relation to said seizure and proposed and pretended sale of said patents, copyrights, and other rights, and rights arising out of or incident thereto, * * * were not disclosed to the President at the time of or before the signing of said Executive order and that the same was signed and issued upon an entire misunderstanding or mistake of facts which, if the same had been truly stated and known to the President, would have prevented his signing or issuing of the said order."

What facts were there that were concealed from the President, that are now made the charge of a conspiracy to deceive the President of the United States? What facts are there which, if the President had known, he would have acted differently? Who was it that made these misrepresentations? Who is it that

is responsible for that deceit? Not an allegation in the Complaint to answer those questions!

And when your Honor turns to Paragraph Thirty-fourth of the Complaint, the allegation with reference to Mr. Polk is this:

> "Complainant is informed and believes, and therefore avers that said orders of said Frank L. Polk were in fact prepared by or at the instance of the said defendant, The Chemical Foundation, Incorporated, and at the instance and procurement of the persons, firms, and corporations in control of said dyestuffs and chemical industry, in pursuance of the scheme and conspiracy as hereinbefore set forth; that necessary and essential facts with regard to the seizure and proposed and pretended sale and disposition of said patents and other rights mentioned in said orders at private sale were not stated or disclosed to said Frank L. Polk."

Again we ask, what facts were there that were necessary and essential in regard to the seizure that were not disclosed to Mr. Polk? They go on and say that such facts were not only not disclosed to Mr. Polk.

> "but were withheld from him and suppressed; that other facts in connection therewith, and especially the attitude of the Federal Trade Commission, charged with issuing licenses under the enemy-owned patents and other rights aforesaid, with respect thereto, were misstated and misrepresented to said Frank L. Polk."

What facts were misrepresented and misstated and what was the attitude of the Federal Trade Commission that was not disclosed to Mr. Polk?

I venture to say, your Honor, that this is the first time in our political history that any administration, no matter what its political complexion, has sought to invoke the judicial arm of the Government

in an effort to set aside a solemn act of a President taken in time of war. Certain it is, and to our lasting glory be it said, that no administration ever before sought to pillory a President and other high officers of the Government upon such unfounded and insufficient allegations as I have just read.

And so at the threshold of this case we say that we are glad of the opportunity to come into this Court to meet these charges. We say that the Government has not alleged facts in support of these allegations, because there are no such facts. We say that the Government will not prove these allegations because they can not be proved. We go further and say that we shall show affirmatively that the President and Mr. Polk acted in this manner with a full knowledge of all the facts, and that they and the other officers of the Government who were responsible for this transaction acted in the best of motives and solely for the best interests of the Government and the people.

Indeed, we go further and say that we have nothing to palliate or excuse, that we are proud of our part in this transaction, and that only those who are blinded by partisanship or self-interest can fail to see that the transfer of these patents to The Chemical Foundation, in trust for the chemical industry and the country at large, was one of the greatest constructive achievements that has come out of the war.

No one can understand or probably appraise the motives of the President and the others concerned with him in this transaction without a knowledge of the conditions that gave rise to the organization of this corporation and the transfer of the patents to it. This involves a consideration of the legislation creating the office of Alien Property Custodian and a consideration of the policy of the Government in handling enemy-owned property during the war.

It leads us into a consideration of these particular

patents and of their relation to the chemical industry of the country. It suggests a consideration of the importance of a chemical industry for the national defense, the public health and the proper economic development of industry; and it necessitates a consideration of the use that the Germans made of their United States patents here, and of the effect thereof upon a proper development of an organic chemical industry in this country.

Now, the Governmental policy with regard to enemy property during the war, is first reflected in the Trading with the Enemy Act, as originally enacted in October, 1917. Under the Act as then enacted, the Alien Property Custodian was a mere conservator of enemy property; and as pointed out yesterday, his only power with regard to such property was contained in Section 12 of the Act which in substance provided that the Alien Property Custodian shall hold the property, "and under such rules and regulations as the President shall prescribe, may manage such property, and do any act or things in respect thereof or make any disposition thereof or of any part thereof, by sale or otherwise and exercise any rights which may be or become appurtenant thereto or the ownership thereof, if and when necessary to prevent waste and protect such property—" "If and when necessary to prevent waste."

Now, it will be shown to your Honor, that when the office of Alien Property Custodian began to function in October, 1917, and the reports required by that Act to be filed with the Alien Property Custodian showing what German property there was in this country, began to pour in, it was a revelation to the Government to see how much German property there was in this country, and how numerous were their commercial enterprises here, and how far-reaching was their control in many essential commercial enterprises.

Mr. Palmer surrounded himself with a staff of men imbued with the idea that we were in a war, and that the war had to be won, not only by those who faced the Germans in the trenches, but by those who stayed behind, and they went to work, your Honor, and they had not been going long, when it was realized that the position of the Government was an utter absurdity; that here we were in a war, in a death grapple with Germany, and yet under this Act constituting the Alien Property Custodian a mere conservator, the Cnstodian was going on conducting German business here, making huge profits out of the very war that the Germans had forced on us, and under that Act such profits had to be held for the benefit of the Germans.

I know, I am not losing sight of the fact that the Statute speaks of the interest of the United States and the owners; but the interest of the United States as then understood, and as now understood, were the interest of a conservator. And so Mr. Palmer went to the President and went to Congress and pointed out the absurd position that we were occupying; that the policy of the Government in holding this property as conservators was a mistaken policy; that here the Government had something that could be used as a weapon against Germany rather than to hold it for them until the war was over.

And he asked that Congress for an amendment of the Act, an amendment that was subsequently passed and that I shall presently discuss. But I want to bring your Honor's mind, if I can, back to the time when that amendment was proposed and passed. I want your Honor to realize the military situation that existed at that time. It was March, 1918. The Germans were pouring across conquered France, headed straight for Paris. Our own Secretary of War, coming back from abroad, announced at that time that the

channel ports were sure to fall. It was about that time when their 75-mile gun threw shells into the streets of Paris. Everybody thought that the war was about to be lost; and it was at that time that Congress sat down to consider whether it did not have another weapon at hand with which to strike Germany. And so they passed this amendment, which struck out what Senator Underwood called the "Weasel words in the belly of this Act," namely, the phrase that we were to hold this property and we were to do nothing with it except to prevent waste; and they gave to the President, as Commander-in-Chief of the Army and Navy, the widest power to do with this property what in his best judgment the military situation, the welfare of the country, demanded. And so they said, striking out the words referring only to the prevention of waste, that "the President shall have power to manage such property and to do any act or things in respect thereof or make any disposition thereof or of any part thereof by sale or otherwise." Please note the word "otherwise." "By sale or otherwise; and exercise any rights or powers which may be or become appurtenant thereto or to the ownership thereof, in like manner as though he were the absolute owner thereof." The English language could not well have expressed it any broader than that—"that he shall have the power of disposition of this property by sale or otherwise, just as if he were the absolute owner thereof."

I agree with counsel for the Government that this case is going to depend very largely upon a construction of this Act. I say, however, that it will illustrate what Congress intended, if with your Honor's permission I read a few short extracts from the statement made by Mr. Palmer to the Committee of the Senate that had charge of this bill which subsequently became the amendment; and then also I desire

to read to your Honor two paragraphs from a statement made in the Senate and the House.

Mr. Palmer said when he was before this Committee, "one of these amendments gives the President the right to buy; the other gives the Alien Property Custodian the right to sell."

There were two amendments before the Senate at that time. One of them had to do with the Hamburg-American docks situation, as your Honor will recall, and the other was this amendment that we are concerned with.

Now, Senator Smoot said: "Not only this property but any other property."

Mr. Palmer said, "Of course. What that amendment means is just this: As the law stands today, I am simply a conservator."

Senator Hardwick interrupted and said, "a stakeholder?" Mr. Palmer continued: "I cannot sell anything. I list this property. I sit up here and take it in by the millions and hundreds of millions and I see it grow day in and day out with enormous profits which I have got to account for when the war is over."

And then the Chairman said, "You are doing business for the German people instead of your own country." Mr. Palmer said "Absolutely." And then Senator Tillman said, "You are engaged in making money for those whelps over there." And Senator Owens said, "He is." And then again, Mr. Palmer said, "Since we have become acquainted with the enemy property in this country; since we have seen how the German Empire through its financial operations has put an industrial and commercial chain all the way across this country and through our insular possessions, we have become thoroughly convinced that it would be wise and proper and highly desirable at this time if the enemy ownership in some of those properties could be permanently taken away."

And again, "It is a very interesting question at least whether as an effective weapon in the war we ought not to consider re-organizing that sort of a concern by putting the proceeds in cash in the Treasury of the United States to there await distribution at the end of the war. Otherwise I find myself in this position, said Mr. Palmer, "I am today operating factories and mills and industries all over the United States through my directors representing the enemy stock. I am making chocolate in Connecticut, rails in Pennsylvania, woolens in Worcester and New Jersey, dyes and chemicals in New York, lumber in Florida, raising sugar in Porto Rico and Hawaii, raising tobacco in many states in the South, making beer in Chicago, lead pencils in New Jersey, and conducting all these various kinds of business and many others, most of which are making enormous profits by reason of the very conditions for which the enemy is responsible, namely, the war conditions. If I must simply sit here holding the stock of these companies and making these enormous profits out of the war with a possibility of returning both principal and profits to the German owners at the end of the war, I am doing a tremendous favor to the German Empire, our enemy."

And then when the matter was before the House of Representatives, and they were debating this very amendment, and especially that part of the amendment which provides "that any property sold under this Act except when sold to the United States, shall be sold only to American citizens at public sale to the highest bidder after public advertisement of time and place of sale, unless the President, stating the reasons therefor in the public interests, shall otherwise determine." When they were discussing that particular part of the amendment, the question was raised as to the meaning thereof, and Mr. Shirley, one of the most

brilliant men that ever sat in the Lower House of Congress, who had this bill in charge, said:

"When it came to the second amendment, the provision as it had passed the Senate, while doubtless intended to safeguard the disposition of this property might have and in many instances would have resulted in transferring the property back into the hands of the very people that we desire to take it from."

Note that language—"The people that we desire to take it from." The purpose of Congress was to take this property and never return it. Call it "confiscation" if you will; it is still the fact.

"Because by having an absolute requirement that the sale must be made to American citizens at public auction to the highest bidder, in many instances it meant that the minority interests, American in name only, would have been the actual purchasers and the property would really be held in the future as in the past, for Germany. No greater blow and no more legitimate blow can be struck in this country against our enemy, Germany, than by depriving her of the industrial control that she had through ownership of many corporations and many industries in America." That is what they were legislating about. "And we would be lacking in ordinary common sense, to say nothing of patriotism, if we did not provide for a separation of these German citizens from control in great industrial matters. We provide that when the property is sold, it shall be sold at public sale, after public advertisement, where the property or the major portion of it is situated, to the highest bidder, who shall be an American citizen. That," says Congress, "is the broad rule that we lay down as being the policy that ought to be followed in all these cases where there is not some compelling reason otherwise; but having laid down that general principle, we provide that the President, for reasons stated, shall have the right to

order the disposition of this property by private sale or otherwise—by private sale or otherwise. And we further provide that after the sale has been made, the Alien Property Custodian may, upon order of the President, set aside such sale for reasons stated and subsequently the property may be sold at public sale or otherwise as the President may direct.

"In other words, we state as the judgment of Congress, that the property, unless there be special reasons to the contrary when sold shall be publicly sold; but we give to the President the power in the interests of the Nation to declare that it shall be disposed of otherwise, when, in his judgment, it is necessary so to do, in order to protect national interests."

Now that was the frame of mind of Congress when this amendment was before it, that was the purpose that Congress had when they said that the President shall have the right of disposition of German-owned property by sale or otherwise in the same manner as though he were the absolute owner thereof.

And we say, your Honor, that under that Statute, the President could dispose of German-owned property, just as the Statute says, in any way that he thought was necessary for the national interests and for the winning of the war. This was a war measure as the Supreme Court has held, enacted at the very height of the war, at a time when it looked very gloomy; when we were casting about for every weapon that we could lay our hands on to smite the enemy; and we say that if the President had thought it was necessary for the protection of the nation, for the winning of the war, to have taken any of this property, or have given or privately sold it to any of our allies under this power, he would have been thoroughly justified. If, in the conduct of the war, it had seemed to the President proper and necessary that any of these

patents should be sold for a small sum to any manufacturer here, who was engaged in urgent war work, to enable him to do that work properly and speedily, we say that the President would have been thoroughly justified under this Act in so disposing of that patent.

We do not admit for a moment that either the President or the Alien Property Custodian occupied the position of a Trustee in the sense that the Government would have your Honor hold. They criticize the language in our Charter, as to our fiduciary capacity. May I not use the same argument against them? For whom was the President—for whom was the Alien Property Custodian—trustee? We contend that the fiduciary relationship, the trustee relationship, this phrase "common-law trustee" which so puzzled Colonel Anderson, means nothing more nor less than that the Alien Property Custodian was an officer of the Government and as such officer was in a fiduciary capacity to the Government.

A great statesman once said that a public office is a public trust. It is in that sense that the Alien Property Custodian and the President were trustees of this property. But how can it be argued in the face of this amendment giving to the President the absolute power of owner of this property, that he was nevertheless a trustee, bound to see to it that the very last penny was realized from every particle of this property, to disregard the necessities of the country, to lay aside the fact that we were in a war, and to have his mind single and directed solely to the purpose of getting every dollar out of this property in order to hold the money for the Germans?

Indeed, our position is not compatible with that of the Government. I am not afraid of the word "confiscation." As I read this Statute, the amendment of March 28th, Congress did give to the President the

power, if he thought it necessary for the preservation of the nation and the conduct of the war, to confiscate German property. But in fact we have no confiscation in any sense in this case.

And now if your Honor will permit me, I want to read a short extract from a statement made by Senator Underwood in the Senate, when they were debating this very section, because it is so apt and apposite on the question of confiscation. He said:

> "Now why is this a blow to the German interests? And why is it necessary to protect our country that this provision should be passed? We are fighting the German peasants behind St. Mihiel, we are attempting to destroy the lives of men who had nothing to do with bringing on this war, who probably have no desire to continue it and who are doing it because they are hurled to the battlefield by an autocratic power. What we want to do is to wipe them out of the way so that we can win the victory.
>
> "But this property is owned by the junker-class of Germany, not the men on the battlefield, but the millionaires, the titled class, lords of the manor, the Kaiser himself, and they have shown every hour and by every act their desire to protect this property, own it and control it, when the war is over. I would far rather fire a shot at Berlin and at the junker class of Berlin who brought on this war and keep it going, than I would fire a shot at St. Mihiel, at the peasant of Germany.
>
> "It is necessary for us to take over this property, not only its control and possession, but absolutely to Americanize it to protect American interests. It is necessary for us to take it over and let the German junker class know that America has her back against the wall, that we are fighting this war in earnest, that we are willing to fight it all along the line, and that there is no surrender on our part until a victorious settlement of the issues involved.
>
> "We are too slow, already we ought to move

faster. I can understand how there are some interests in America that are apprehensive of the passage of this legislation. There are some interests in America that own property in Germany. I understand from Mr. Palmer's testimony—he so states—the largest ownership of property in Germany is in the Standard Oil Company. Most of the property that American citizens own in Germany is controlled by great corporations. Now, I do not desire to see their property confiscated in Germany"—

"Confiscated in Germany," your Honor—"but Mr. Palmer said, and we know it to be the fact, that where there is one dollar's worth of American property invested in Germany there are more than a hundred dollars of German property in America. Where they strike one blow at us in confiscating American property, we strike the blow a hundred fold in taking theirs."

And so I do not recoil at the word "confiscation." I say that by this amendment Congress, which had the power to confiscate, gave that power to the President when in his discretion the public interest demanded it, to exercise that power if necessary; although, your Honor, it is not necessary for us to argue that this transaction amounted to a confiscation. When I come to a discussion of the consideration paid for this property I think I shall show your Honor,—I do not expect that I can convince you by my argument, because this is not supposed to be an argument; but I say that the sworn testimony coming from the witnesses will convince your Honor in the end that the consideration paid for this property, was every dollar and every cent that that property was worth.

So I am not invoking the power of confiscation that I say is lodged in the President by this amendment, but I say we are not frightened by the word "confiscation," that, if necessary, the Court will hold that for the purpose of winning this war the President

had the power to dispose of this property by the sale or otherwise—and "otherwise" means just what it says.

So this Act of March 28th was the adoption by the Government of an entirely new policy. The Alien Property Custodian was no longer to be a mere conservator and authorized to sell this property only to prevent waste, but he, acting under the authority of the President, was given the widest power of disposition.

Mr. Palmer went on, seized enemy property which ran up into the hundreds of millions of dollars, and sold a great part of it in an effort to carry out what he considered to be the new policy of the Government, namely, to root out the German industries in this country and to Americanize them. And he had not gone far in his program of sale and disposition when he found that the patent situation was not covered by legislation that made him free to act with respect to that property, as he could with respect to other property.

It is alleged in the Bill that the Alien Property Custodian himself was in doubt as to whether under the Act of March 28th, 1918, he had the power to seize enemy patents. That is not the fact. The Custodian and his office at all times insisted that they had that power. But the Attorney General ruled otherwise, and so the Custodian took up with the President the question of having an amendment of the Act to remove that doubt.

And that amendment was the amendment of the 4th of November, 1918, which, as your Honor knows, expressly provided that the Alien Property Custodian might seize enemy-owned patents and dispose of them, either by sale or otherwise, in the same way that he could other German-owned property.

Now, why was it important to seize enemy-owned patents? It is charged in the Bill that a statement was made by Mr. Bradley, who was General Counsel

to the Alien Property Custodian, at the time that this November, 1918, amendment was before Congress, that the sole purpose was to enable the Custodian to sell enemy-owned property which had as a component part thereof enemy-owned patents. Well, whatever statement Mr. Bradley made there is of record, but I do not understand that the Government contends that whatever statement Mr. Bradley made in any way limits either the intent or the purpose or the force of the act. The act did give the broad power to seize, sell and dispose of enemy-owned patents.

And now what was the great importance of these patents? This leads me, your Honor, to a discussion of the situation here in the United States, at the outbreak of the war, and during the war, especially in connection with industries, United States industries, that were controlled by Germans, and that were in most cases affected by United States patents.

Your Honor will not be able to understand the purposes of the Government in making this transaction with The Chemical Foundation, unless your Honor clearly understands what the situation was here, when the war broke out; how these patents stood in the way of the progress of the chemical industry, because you have to judge the act and the purposes of the Government in the light of the situation that existed.

Now, I said that Mr. Choate had charge in the Alien Property Custodian office, special charge, of investigating the German-controlled chemical industries in the United States. Mr. Choate was engaged in that investigation for many months; and with that keen perception that characterized the work of his illustrious father, Mr. Choate has written a chapter on the chemical industry in the United States, and the relation of the German chemical industry to it, in Mr. Palmer's report to the President, that is a classic, and

that will live long after we are all gone. And it is upon that report, your Honor, and the facts therein contained, that we shall show that the President, Mr. Polk, and the Alien Property Custodian, all acted. It was in the light of the revelations therein contained that the President determined that it was for the best interests of the nation that this transaction should be put through; and I say this, your Honor, in explanation for the time that I am going to take, because I consider it important in pointing out to your Honor in some detail what that investigation disclosed, because it was in the light of the result of that investigation that the Government acted in this transaction.

Now it was found beyond any question, that prior to the war, Germany had a world-monopoly of the dyestuffs industry. I say a world-monopoly, and I mean what I say. That monopoly included the United States. And not only did they have a monopoly of the dyestuff industry, with all its ramifications that I shall point out in a little while, but also a monopoly of many essential drugs, essential to the welfare and the health of our people.

I wish that I knew something about chemistry, so that I might really picture with the proper effect the necessity, the national necessity of any country being chemically independent. Someone has said that chemistry is the life of every nation, as it is the life of every individual. I wish I knew the subject well enough to picture to your Honor the effect of a country dependent upon others for a chemical industry. But chemists are born and not made, and I am free to say that I know very little about chemistry. It is said, your Honor, that the dye industry is based upon a piece of soft coal. All these beautiful colors and dyes that delight the eye, are the product of soft coal. They take soft coal and distill it. From it they get coal-tar. They distill the coal tar a little more. From

it they get what they call the ten crudes. Then they go on distilling, and by adding certain acids and other things to some of the crudes, they produce these wonderful colors.

There are about three hundred so-called intermediates, that is, the raw product, from which the colors are made, and we shall show that there are several thousand different colors, and that in 1914, before the outbreak of the war, there were imported into the United States alone, from Germany, about a thousand different dyes and colors.

Now, we used to get our colors—they used to be natural colors. For instance, what used to be known as turkey red was alizarin, which used to be obtained from the madder root. Now, they make it in the laboratory. Indigo used to be made from the indigo plant, which was very extensively grown in India. Now they make it very much better in the laboratory; and so I could go on. In other words, there are now synthetic drugs and synthetic dyes.

Now, it was an Englishman that discovered the aniline dyes; but Great Britain was just as backward in the development of a chemical industry as we were, and what the Englishman discovered, the Germans continued to improve, with the result, as I have stated, that at the outbreak of the war, Germany had a monopoly of the dye industry of the world.

Now, among the drugs that are by-products of the dye industry, are such essential drugs as salvarsan, as to which I need say nothing further; novocain, mentioned by Colonel Anderson, yesterday, and luminol, the drug that prevents epileptic seizures—of those two Germany had the monopoly.

Now Germany, from her point of view, was much more far-sighted in her treatment of the chemical industry that we were in this country. I say, from her point of view, she subsidized the industry. She pro-

tected the industry. She encouraged the manufacturers of dyes to combine, where we here have a law against combination. It was her pet industry. It was her most prosperous industry. It was the key industry, the industry that she used as a wedge for her chemical world-supremacy that she was after in every country, and so she used it in the United Steaes.

Thus, in 1914, there were six large manufacturers of dyestuffs and pharmaceuticals in Germany, and those six formed two combinations known as "Cartels." There was the Badische concern, of which your Honor saw a representative here. There was the Bayer concern, and the Berlin concern. These are not the full names of the concerns. I am using short terms. That was one Cartel. The other Cartel consisted of the Farbwerke-Hoechst concern, the Cassella, and the Kalle. These concerns were capitalized at enormous amounts.

In 1916, these two cartels joined hands and formed one large cartel, the Interessen-Gemeinschaft, the so-called "I. G.." Their capitalization is upwards of a half a billion of dollars. In gold marks, it is about a billion and a half, over a billion and a half.

They pooled profits, they divided territory and they interchanged patents or processes, and all of them at the outbreak of the war had agencies in the United States, agencies that had the exclusive right to sell the product of the cartel; and although many of our essential industries, such as the textile industry, the leather industry, the paint industry, the wall paper industry, the carpet, furniture and ink industries—although they were all dependent upon a supply of dyes and although many essential medicines and drugs, as I have pointed out, were manufactured in Germany, we here in the United States, at the outbreak of the war had but four concerns, none of them really making

dyes; they were no more than assembling plants, so-called, importing their raw material from Germany and producing such dyes as they could make out of those.

None of them ever made what are known as the "fast" dyes—fast to light. Now, why was it? Why was it that Germany had this monopoly? We have soft coal in this country; plenty of it; and that is the raw product that they need.

We shall show your Honor, as we go along, that for years before the war, there were far-seeing citizens that saw the importance of developing a chemical industry; that they took samples of our soft coal and sent it abroad to Germany to have analyzed, and see whether dyestuffs could be made out of it, and always got the report back that it was not any good.

There were times before 1914 when here and there some venturesome manufacturer would start up and try to make a dye or two, and then be struck by the German competition and have to succumb.

Now, what was it that prevented a development of the industry here? The Germans were very careful to patent every invention that they made in every country where they did business. We were more liberal in our patent laws than most countries. In France, for instance, you can not patent a medicinal preparation. I do not believe there is another country in the world, other than the United States, which will permit a foreigner to obtain a patent without requiring him to manufacture in that country under that patent.

There are very few countries that issue what are known as "product patents," patents that protect not only the process of making the article, but the article itself. But in the United States the Germans found a safe harbor. They came here and took out patents by the thousands, both process and product, enabling them not only to prevent anybody in this country from

manufacturing the article according to the process described in the patent, and thereby stifling the development of an industry here, but also preventing any other country from importing such article into the United States. And they did not have to work their patents here, and they did not.

Now, that was the legitimate thing to do, and when Colonel Anderson, in discussing the consideration paid for these patents, pointed to our statement that these patents controlled the industry, and said, how can it be argued that a consideration of $250,000 for patents that controlled an industry amounting to $25,000,000 was adequate—he was talking about the control by the Germans. Of course, such control as the Germans had was worth more than $250,000. But when you use your patents lawfully and not unlawfully, as I shall show the Germans did, it is an entirely different matter, and they are not worth nearly so much. We shall prove that these patents cover only about five per cent of the production of dyes and dyestuffs, and we shall show, as I have stated before, that the consideration paid for them was ample and every dollar that they were worth.

But I say the Germans used these patents unlawfully. What did they do? How could they, with patents which controlled only about five per cent of the output of dyes—how could they control and obtain a monopoly as they did?

Now, I will show your Honor how they did it: They had a favorite game which they called "full-line forcing." Very simple—simple in its application. They would go to a manufacturer that used dyes. He would say "I want so much of this dye and so much of another," and they, knowing what he really required in his business, would say, "Well, how about indigo?" "Oh, well, we are buying indigo from John Smith." They would simply refuse to sell him the

others. In other words, they made it absolutely impossible by their full-line forcing to have anybody here survive, either the manufacturer of the dyes or the man that used the dyes, without those few dyes that they controlled with their patents.

And then they had another favorite way which they called "dumping." We shall show your Honor that here and there somebody would start up manufacturing a certain dye or chemical. What would the Germans do? They would not care for a tariff. In one instance, Congress did, in order to protect this little industry, put a duty of ten per cent on certain dyestuffs but that did not make any difference to the Germans. They would undersell; they would dump their product here. They would give it away rather than let anybody start up in business here. And it was perfectly easy for them to do. What the Badische lost in underselling here, they made up in raising their prices in the Argentine. It was a world-monopoly. What the Hoechst lost was made up by the whole pool. Any man that started up here to make dyes was fighting the whole monopoly, not just one manufacturer.

And then, they did not stop at that, your Honor. It will be shown and was graphically described in Mr. Palmer's report, that these Germans took no chances; that even though we had no dye industry here, they organized what was known to be the widest and most far-reaching bribery of dyers in the plants of manufacturers that was ever conceived by anybody. The whole textile industry was honey-combed with bribery. So much so that, as the Government knows, suits were brought here based upon revelations of that bribery, which resulted in the payment by these Germans of hundreds of thousands of dollars back to the textile industry that had been paid in the way that I have described.

And so, by full-line-forcing, by dumping, by bribery, they were enabled to exercise that control by means of these patents, which, although they covered only five per cent of the total output, constituted a complete barrier to the development of any dye industry in the United States.

So that when the war broke out Germany had this monopoly and we had no chemical industry to speak of. The result of our dependency upon Germany was soon made apparent. We declared war on Germany on the 6th of April, 1917, but Germany declared war on us in August, 1914. For no sooner had the Germans declared war against England than Germany placed an embargo upon the export of dyestuffs, not only to the countries that she was at war with, but to the United States.

Here we were, our industries absolutely dependent upon those dyes. The textile industry had only sixty days' supply of dyestuffs; they were in utter panic when the supply was cut off. They had no home industry to turn to for their supplies. But Germany cut the export right off, with the purpose and cunning far-seeing, as I shall presently show.

What was the meaning to this country of the cutting off of these dyes? It is not measured merely by the $25,000,000 that Colonel Anderson speaks of, which is the value of the dyes. Industries manufacturing fabrics and other products worth over three billions of dollars were dependent in this country upon dyes. Over two millions of people are employed directly and indirectly in industries that were dependent upon dyes, and Germany knew when she cut off the supply that she was throwing our industries into an utter panic and, if she had succeeded, would have thrown over two millions of our people out of employment.

Germany knew what she was doing. They had an ambassador here named Bernstorff. Bernstorff had

some advisers here. There was a Consul General, who was the commercial adviser; then there was a privy councillor named Albert, who came over here to boss the job for Germany.

With your Honor's permission I want to read two or three extracts from communications that passed between Germany and her representatives here, showing the purpose that Germany had in cutting off the dye supply to this country. Because it is all important. Those are the facts that were before the President and the other officers when they did what they did do with these patents. When they put through the transaction that is here attacked the President knew of these facts that I am stating. Bernstorff says to his Government:

"It is reported to me by Hossenfelder"—Hossenfelder was the Consul General here, the trade adviser—"that the stock of dyes in this country is so small that by a German embargo about four million American workmen might be thrown out of employment. (Signed.) Bernstorff."

Mr. Bernstorff overestimated the number of people that would be thrown out of employment. It was not four million, it was only about two million. But he was cabling to his Government the situation that we were in with respect to dyes, and that an embargo, a German embargo on dyestuffs, would throw four million American workmen out of employment.

Privy Councillor Albert, as I said, was here and had charge of the German interests, their spy system, and all the work that they were engaged in before we entered the war and subsequently. Based upon this cable of Bernstorff and the information therein contained, he cables Berlin. It is a blind cable, but the explanation of it is in Albert's letter, which I shall read. The cable is this:

"Hamilton Yerkes and associates urgently request preventing all Hoechst and similar shipments. Inform immediately."

Signed, of course, not by Albert, but signed in the name of Charles Suchard. Then Albert writes to Brother Hossenfelder, explaining this telegram as follows:

"Dear Dr. Hossenfelder—Sunday night the following wireless message went to Berlin through the agency of the Deutsche Bank"—

Then he quotes the telegram.

" 'Hamilton' means 'Embassy,' I am Yerkes. Unfortunately there was no code word for consulate general, so we had to designate you by the word 'associates.' In the stress of business I had no time to ask your assent, as you know we were agreed on the matter.

"The reference to 'Hoechst' is meant to convey at the same time a warning in regard to Mr. Metz."

Mr. Metz is a gentleman who will be a witness here. Your Honor I am sure will gain much information from Mr. Metz.

"I assume that this is understood over there. I purposely refrained from direct mention of Mr. Metz, as well as the definite war character of the dyestuffs, because it had to be taken into account that the American Government will be informed of the contents of the message both directly and indirectly through the English."

Bear this in mind, your Honor: This is dated April, 1915, two years before we declared war on Germany. "For evident reasons it would not be advisable that the advice from official sources here not to ship dyestuffs and potash should come to the attention of the American authorities."

And so the result was that they absolutely shut down on our supply of dyestuffs.

Then there were people here that were taking counsel as to what should be done in the matter, and finally it appears—and this again we find in connection with Mr. Albert—that the New York World had an editorial in which, among other things, they pointed out the following. The editorial was headed "Helping us out," and in it was said:

"Two large German chemical and aniline dye concerns are reported to be establishing in New Jersey to supply American demands hitherto supplied from Germany."

That did not escape the eagle eye of the German spies here, and they had a man named Boy-Ed here. Boy-Ed during the war made himself very famous, as your Honor well knows. Boy-Ed finds this editorial and so he writes to his boss, Privy Councillor Albert. I will read his letter. This again is April, 1915, mind you, two years before we were in the war. He says:

"Today's World contains the enclosed little article on the alleged erection of dyestuff factories in New Jersey by Germany. In case you can take no steps to prevent an undertaking of this kind I beg you to state whose else attention I can call to the matter."

And Albert answers him in a letter, and as to this particular point says this:

"With regard to dyes, I got into touch with local experts in order to determine what truth there is in the news. According to my knowledge of things the matter is a fake, inasmuch as our factories have bound themselves orally and by word of honor to do nothing in the present situation which might help the United States."

Albert, Privy Councillor of the German Government, vouches for the fact that the German factories had agreed among themselves orally and upon their honor to do nothing that will help out the United States, in April, 1915, two years before we went into the war.

Of course, if we had had a chemical industry in the United States, if we had not been dependent upon Germany for these very essential supplies, upon which millions of our people depended for a livelihood, it would have made no difference what machinations these German spies went through. But this was a matter of the utmost importance to our country and to our industries.

Then, again, they not only cut us off from the supply of dyestuffs and drugs, but also from the supply of potash. Your Honor knows that for many years we were dependent upon Germany for a supply of fertilizer for our farms. And what the Germans intended to do with the United States regarding such essential supplies as Germany had control of is well indicated by a statement made by one of their famous scientists, Professor Ostwald, who says:

"America went into the war like a man with a rope around his neck, which is in his enemy's hands and is pretty tightly drawn. With its tremendous deposits, Germany has a world monopoly in potash, a point of immense value which cannot be reckoned too highly when once this war is going to be settled. It is in Germany's power to dictate which of the nations shall have plenty of food and which shall starve."

That was the way that Germany thought of her control of these essential supplies. They would starve America; they would keep the hypnotic from the epileptic; they would keep the Salvarsan from the man

afflicted with that dread disease; they would throw millions of our people out of employment—anything to serve Germany's world interests?

And those are the facts that the President had before him; those are the facts upon which he acted; those are the facts that induced him to exercise the power that Congress gave him by this act of March 28th. They talk about our drugs. I have here a statement made by one of our foremost scientists before a Committee of Congress that was investigating this very subject, who said, with reference to the cutting off of essential drugs:

"The pitiful calls of our hospitals for local anaesthetics to alleviate suffering on the operating table, the frantic appeals for hypnotic that soothes the epileptic and staves off his seizure, the almost furious demands for remedy after remedy that came in the early years of the war, are still ringing in the hearts of many of us."

They come here and speak of the duty of the President to get the last dollar out of this property. I wonder what they think a Government is for; whether it is a Government to protect its own interests and its own people, or whether it is a Government that must throw away every safeguard that God Almighty has placed in its hands to satisfy a subtle refinement or notion of what is required of a representative of a Government that seizes property of an enemy that can stoop to the things that Germany did here to the United States in this war.

Now, while our sick in the hospitals, upon whom so-called "Bulgarian" operations had to be performed, because the necessary anaesthetics could not be obtained were writhing in their misery, we find the German representatives here gloating over the situation

in which the United States found itself. We have here a letter from this very man, Hossenfelder, a report from him to his Government, in which he says:

> "To enumerate the industries which are suffering from the scarcity of German chemicals would lead too far. I may, however, mention that the cry for help which comes from the ill, the physicians, is becoming louder and louder and more and more insistent. The country, however, is being hit hardest by the lack of dye stuffs which makes itself felt more and more every day, in regard to which I may refer to the report of the business expert. What the United States is able to produce in dyestuffs, is neither in quality nor in shades the remotest, sufficient to meet the existing demand—"

Mind, your Honor, that is the German reporting to his Government—

> "It is now acknowledged here on all sides, that the reports to the contrary of Mr. Norton are not only too optimistic, but directly untrue. I shall speak of Mr. Norton later in estimating the effect which will be produced by cutting off the importation of potash, chemicals, and dyestuffs. It should be taken into consideration that the circle of persons affected is very extraordinarily large—"

—he is counselling his Government—

> "through the lack of dyestuffs alone, not only to a whole list of important industries, wool, cotton, leather, paper, gradually made lame, but for the great public, living becomes more expensive, both through the rise in price, as well as through the small durability of all products for whose production colors are used."

And then after they had placed the embargo on dyestuffs, drugs, potash, and other chemicals, a situation arose when the German Government felt it

was to its interest to lift this embargo for a little while. Do not let us be fooled—it was not to help the United States. It was a war move by the German Government, and so they lifted the embargo and said: We will let you have dyes and drugs and potash, but we will let you have them only on condition that you make the British Government lift the blockade that it has established in this war against Germany. Reflect for a moment, your Honor, what that means—Germany was dictating to us our foreign policy. In 1915 she said: We will starve you by not giving you potash. We will make your people suffer by not giving them drugs. We will throw your people out of work by the millions unless you make Great Britain lift her blockade. And they had the audacity through one of their representatives here to write direct to the President and tell him so in so many words. Here is a letter written on the 16th of June, 1915, almost two years before we went into the war, written by this gentleman, Metz, who will delight us with his testimony, directed to President Wilson at the White House, in which he says:

"My dear Mr. President:

I know that you are conversant with the serious situation that confronts the textile and other industries of this country through the failure to continue the receipt of dyestuffs and chemicals. Efforts are being made to have the recent Order in Council—

That refers to the British Order in Council—

"—allowing two shipments to pass, modified somewhat, so that shipments will be allowed through on a basis that Germany will agree to. In this connection an extract from a letter received from Justizrath Dr. Adolph Haeuser—"

May I stop here to explain that Dr. Adolph Haeuser is the President of the Farbwerke Hoechst

Company, one of the six that comprise the German Trust, who, during the war were at the head of all the combined German chemical industries—

> "received from Justizrath Dr. Adolph Haeuser, President of the Verein zur Waehrung der Interessen der chemischen Industrie Deuthschlands, in Berlin."

—which I am a sufficient German scholar to be able to translate, that he means that he was the President of the combination that had charge of the disposition of the output of all the chemical concerns in Berlin, and, here, Brother Metz explains it thus—

> "and which is composed of all the dyestuff and chemical manufacturers in the German Empire, dated May 26, which will probably interest you—"

That is, he says to the President, here is a letter or an extract from a letter of this man which will interest you, it is as follows:

> "I note that you have carried out your plan" meaning Metz, "to organize an American dyestuff consumers' association. We here are gladly ready to send dyestuffs to America, but we rest on the standpoint that we can not accept this as a favor or gracious act on the part of England, but that we can only send dyestuffs when England recognizes the right of America to receive goods from us, and you send us cotton in exchange for such dyestuffs. This is also the standpoint of our Government. Any other standpoint would be unworthy of America or Germany."

I think he might well have left America out of it—

> "We are, of course, somewhat accustomed—"

Listen to this language directed to the President of the United States:

> "We are, of course, somewhat accustomed to seeing the American Government look at situations through two pairs of spectacles, according to whether Germany or England is concerned in the question. England can simply deny American suggestions off-hand, and the American people yield with astonishing submission, although the entire carrying on of the war on the part of England and her allies depends entirely upon the good-will of America. When Germany, however, does anything toward using her own good rights, the act is decried in America. I hope America will succeed in forcing England to stop interfering with commerce between Germany and America, and if so, you will find us only too glad to give you all the dyestuffs that you need."

That is the extract of Dr. Haeuser's letter to Mr. Metz, which Mr. Metz sends to the President of the United States, and then he adds:

> "I submit this to show you the situation as it is viewed by Dr. Haeuser, who, at the present time, represents officially the entire chemical industry, as President of the Berlin organization. This simply indicates that they had available goods in Germany which we need here which we can get if Germany is assured that the goods will not be taken off by England, and that she will get cotton in return.
>
> "I submit the extract to you for what it is worth, knowing that you appreciate the situation, and assuring you that so far as I am concerned, I fully appreciate the delicacy of the situation."

I wonder, your Honor, what our situation would be today, where we would be today, if this transaction that they are now criticising, had not been put through and the chemical industry had not been permitted to

use these patents; if thereby we had not been successful in founding and developing a chemical industry of our own, which, as I shall show your Honor, is almost 90 per cent. sufficient to take care of our interests today.

I say, I wonder where we would be today, in the present political situation over in Europe, with France having possession of the Ruhr, with Germany having possession of the dye works, if she still had her monopoly here. I wonder if Dr. Haeuser would be writing, for the information of the President of the United States, that they would again starve our people by denying us potash, make our sick suffer, and throw our people out of work, if we did not insist upon France evacuating the Ruhr.

The situation might well have arisen, had not the President and his advisers been sufficiently far-seeing to realize that the war was not won on November 11, 1918, when the Armistice was signed; that the war was not won simply because we beat Germany back. This was a commercial war. The war was won when the Administration saw to it that our country, our industries, were freed from the German slavery.

I have spoken of the importance of the dye industry to commerce. I have spoken of it in its importance in medicine. I have spoken of the potash industry in its importance in supplying us with food, but we had to have a bloody war to show us its greatest importance to us as a Nation; and that is, the importance of it in its relation to our National defense.

It was not until our soldiers were choked with poison gas in the trenches; it was not until they shot poison bombs into the streets of London and Paris, that the world realized that the war of the cannon and the musket had passed, that the future war would be a war of chemistry; and when we went into the war, we found ourselves absolutely unpre-

pared to meet the German mustard gas or the chlorine gas or the phosgene gas; those deadly weapons were made in the dye factories. They were made from by-products of the coal tar industry.

It was not until Germany knew that she had so far developed her dye industry that she could overnight practically turn every dye factory into an arsenal, to produce poison gas; it was not until she realized that she was free in her supply of nitrates, that she was no longer dependent upon Chilean nitrates, but had what she calls her Haber process, so that she could make her nitrogen out of the air; it was not until then, that Germany was ready to declare war.

It is very significant that the Haber process was perfected as late as 1913, and that Germany declared war shortly thereafter.

Now, where were we, without a chemical industry here at all? How were we to meet this onslaught of the Germans?

And those were facts that were before the President when he came to dispose of these patents, the patents that covered the very processes by which they produced the poison gases that killed our soldiers.

The importance of that was realized, and I want to read a letter from the man that should know the importance of the dyestuff industry as a National defense. I have a letter here from General Pershing, which was submitted to a Committee of Congress, which was considering an embargo to be placed against German importation of dyestuffs after the war; and, as I speak of an embargo, I want to correct a statement made by Colonel Anderson yesterday that Congress refused the chemical industry an embargo. The fact is that Congress gave to this industry an absolute embargo against German importations which lasted for a year and a half, and that only at the

last session of Congress did Congress decline to put a further embargo into the permanent Tariff Bill, but gave to the industry instead the highest protection by way of duties that has ever been placed upon chemicals and dyes.

Now, General Pershing, writing to Honorable Nicholas Longworth, at the House of Representatives, under date of July 15, 1921, says:

"With reference to the protection for the dye industry in this country, it can be stated that the coal tar products of which dyes are the most important at present in peace, is the base of practically all of our high explosives and most of our war gases. Our shortage of chemical plants in general and dye plants in particular prior to the World War, made it difficult for us to obtain a supply of high explosives and gases until we had been in the war for several months.

"From the above," says General Pershing, "the importance of the chemical industry from a military standpoint will be readily seen."

And then I have an extract from the letter written by Secretary Weeks, our Present Secretary of War, also written to a member of Congress with reference to the same legislation, in which the Secretary says:

"The use of high explosives and war gases will unquestionably be far greater in future struggles than in the World War, inasmuch as the coal tar industry, which is the base of all dyes, is also the base of all high explosives and most of our war gases; it is of the most vital importance to preparedness that the dye industry be developed to the fullest possible extent in this country."

I need no better authority for the statement that the dye industry in this country must be looked to by our Government and our future generations for the National Defense, just as we have to look today for

some of our most essential drugs, and just as we have to depend upon potash for our food.

Now, I repeat—I cannot repeat it too often, your Honor—that those were the facts that were before the President, before Mr. Polk, before Mr. Palmer and his associates, when this "iniquitous" scheme that they speak of was put through, when we are alleged to have sacrificed this property and violated our sacred duties as trustees.

Now, that was the situation when the war broke out; when we were cut off from dyes and potash and drugs.

The old saying that "Necessity is the mother of invention" never showed its truth any more than it did in this instance.

Our people went to work to repair the damage that Germany had done us. Our people went to work and started building from the bottom; started to make good the loss that the country had sustained by tamely submitting to German monopoly for years; and they started building up a chemical industry; we had the raw materials; we had the brains. German agents used to go around here among our factories and say that only German brains could evolve the formulas for the manufacture of these chemicals and dyes. We had the brains if we would only use them; and necessity made us use them; and so we went to work and we practically created a chemical industry. The war helped us, of course. There was great demand for the product. Price was no consideration. Labor could be paid what it demanded; and then our people helped along. They changed their styles. They did not demand those wonderful hues and colors that they had from Germany. We did not use them; and so, gradually, your Honor, there was built up in this country a chemical industry that today supplies over 90 per cent of the country's requirements of dyestuffs.

And when this industry went before Congress and begged for an embargo, and finally received this high protection, it was not because we still needed German dyes; it was in order to prevent Germany sending in this ten per cent of dyes that we could not yet make, and resorting to her old scheme of full-line-forcing, her old scheme of dumping, and her old system of bribery; and thus again seek to undermine this industry that had created itself during the war, when there were people who were willing to invest large amounts of money in an effort, not only to make money for themselves, but, I am willing to give them credit, and I think Colonel Anderson will—in an effort to free this country forever of its dependence upon Germany.

There is nothing wrong about the combination of the National Aniline with other concerns into the Allied Chemical & Dye Company.

Colonel Anderson well said yesterday we were not trying here a Sherman Anti-Trust case. If the Government feels it is true that a monopoly was established, it has its remedy under the Sherman Anti-Trust Act; and although they have disclaimed any intent to try a Sherman Anti-Trust Act case here, they did not hesitate to make the charge in this Bill that a monopoly was established.

Now, the Du Pont Company, right here in Delaware, was willing to put its millions into this industry, and they have founded here, or over there, as your Honor will know better than I, at a place called Deepwater Point, one of the greatest dyestuff factories that there probably is now in the world. They have opened a research laboratory where, I am told, they employ several hundred chemists, and they do that wisely because it was the German research, it was the German connection between the factory and the

University that gave Germany the power to monopolize this industry all over the world.

And so we find that by the time we got into the war, this industry was going pretty well. To be sure, they could not use the German patents and they did not, and therefore they were not able to make what are called the fast dyes. The latest form of dyes that the Germans invented; but the country had to be satisfied to take what it could get, and did without fast dyes.

When we got into the war and the Trading with the Enemy Act was passed, your Honor will recall that under Section 10 of that act, the Federal Trade Commission had authority to issue licenses to anybody here to use the German patents; and we shall show your Honor that before the sale of these patents to The Chemical Foundation, the Federal Trade Commission had exercised that power; they had issued four or five licenses, for instance, to persons who undertook to make salvarsan; they issued many licenses to the DuPont Company and to the General Chemical Company and to other concerns here, to use the German dye patents, to try to use the Haber process patents.

The trouble was that to have a patent and to be able to read it is one thing, and to know how to produce under the patent is an entirely different thing. It is the "Know-how," so-called, that is the really valuable part of the process; and we shall show your Honor, as one of the elements that affected the consideration, the value of these patents, is the fact that with these German patents we did not get the "Know-how;" that in point of fact it cost those who went into our industry millions of dollars in research, in building of plant, and in finding out how to make the things covered by the patents.

And so, even after the Federal Trade Commission

was enabled to give licenses covering these German patents, our industry still had to feel its way along. Millions of dollars still had to be laid out in research, plant and investigation before we could succeed in making most of the dyes that were covered by those patents.

And then, after the Alien Property Custodian, under the authority vested in him by the act of November 4, 1918, had seized these German patents, the question arose what was to be done with them?

Now, what was the situation? We had this infant industry. It had succeeded in making some of the colors and dyes. It could not make the fast colors. Many millions of dollars had been invested in it. They were operating under licenses issued by the Federal Trade Commission, under which they had to pay a royalty which, under Section 10, as your Honor will recall, would go back to the German owner of the patent if nothing were done, so that after the war, if these patents had not been sold to this industry an American manufacturer would have had a differential between himself and his German competitor of the amount of the very royalty that he was paying into the pockets of his German competitor.

So that it was perfectly plain that the American industry after the war, if the patents ever went back to the Germans, could never compete with the Germans. We would be back in exactly the same position that we found ourselves in in 1914.

And so, I say, we sat down and considered the situation and we arrived at the conclusion that after consideration, your Honor will see in an instant, that these patents constituted in our hands a weapon that we could use against the Germans in the same way that they had used it against us; that where they stood at our ports with their patents in their hands and said "No; no other country can import into the

United States any dyes because we have a product patent," so, if the American industry took those patents, they could turn around and say to Germany: "You cannot import any dyestuffs here because we have the patents."

And since it was determined that whatever the final disposition of these patents should be, it was to be a disposition that would throw open the use of those patents to the industry in general; that no one should get those patents that could use them in the monopolistic way that the Germans used them. The Government was not going to substitute any American monopoly for a German monopoly. And the next question was: How can that be accomplished?

Well, we had one example of what a public sale of patents meant. The Alien Property Custodian had taken over the Bayer Company. That was a branch of one of the German Cartels here and was the only branch, I may say, in passing, that undertook to do any manufacturing here in this country at all; and they did not manufacture their intermediates, they imported their intermediates and then assembled them here. Their most important product was aspirin; they imported the raw material from Germany and put it together here.

The Bayer concern owned about 1200 German patents covering their particular processes. And before the Custodian and his advisers and the President had an opportunity to decide upon a general and basic plan for the disposition of patents, the Bayer Company was sold—sold according to the amendment of March 28th, at public auction, to the highest bidder, at the place where located, and to American citizens. The property brought a large amount of money—something over five million dollars, I think. The purchaser was a concern called the Sterling Products Company.

What did that mean? It simply meant that to

that extent the German patent monopoly in the United States, which had brought about our pitiable situation at the beginning of the war, had passed from the German hands into the hands of an American who, with full right under our laws, could exercise that monopoly as long as those patents were alive. The Sterling Products Company could take those patents and lock them up in a safe, never put them to any use so there would be no development of the industry. They could hold them, and when our war with Germany was over, they could sell them back to the Germans and we could not say nay. They could license somebody to work under them or not license them, as they pleased. They could give one man a license at one royalty and insist that the other man pay twice as much, and nobody could interfere.

When the Alien Property Custodian realized that the result of a public sale of so many of these patents was simply to substitute an American monopoly to that extent for the German monopoly, he realized that his duty to his Government and his people demanded that some other method must be found, that the chemical industry that had grown up during the war was entitled to a chance to live, and that his duty as trustee, if you please—call him what you may—was not to get the last dollar out of every enemy-owned patent, but to see to it that under the direction of the President those patents, as any other property seized during the war, should be used for the best interests of the public in the carrying out of the purposes of the war, a power that was contained in a war act.

If the other side should say that all I am now talking about was after the Armistice—and that is true—I answer that the war was still on, that the Supreme Court of the United States has held that up to July 2, 1921, the war for all legal purposes was still on; that Congress by very special legislation

excepted the Trading with the Enemy Act when it repealed all other war measures. And I say that our aims, our interests, our purposes in this war were not realized when the President returned from Paris, but were realized when, not only the Treaty of Peace was signed, but when we took advantage of every weapon that the war put into our hands, not only to smite Germany during combat, but to protect ourselves against Germany's intrigues and monopolies after the war.

The next question, your Honor, was how it was possible to so dispose of these patents that we should not change masters, that we should not substitute an American monopoly for a German monopoly. If we went and sold these patents at public auction, we had to sell them to the highest bidder no matter who he was, with the sole exception that under the act, the President could set aside a sale and order re-sale or other disposition.

The buyer might speculate with the patents and not work them, which was just the thing we wanted to prevent. That is just what brought us to the condition that we were in in 1914, that the patents were not worked, that there was no industry created here. The buyer might license or refuse to license; he might hold the patents and sell them back to the Germans, as Senator Underwood pointed out in his debate. Besides, there were a great many of these patents the sale of which the law required should be advertised. It would have been a tremendous expense to advertise the sale of 4200 patents. The advertisement, to be of any use at all, would have to contain a description of these patents; it would have to be a country-wide advertisement, and there was not any money available to the Alien Property Custodian to do any such thing as that.

Indeed they criticise us for having permitted the

dye industry to advance the money necessary to make the search for these patents in the Patent Office, and to record the instruments of transfer. It only illustrates, your Honor, that the Alien Property Custodian was without funds, not only to advertise, but even to search the titles. If we were to sell them at public auction, what were we to do—offer each patent separately? Who would buy it? Offer them in groups—how were you to determine the value? Who knew anything about these patents to enable him to say, when he went to an auction sale, that a patent was worth that much? I venture to say, your Honor, and of course it is not capable of proof, that if the Government had offered these patents at public auction, there would not have been a bidder for them. No man will buy anything that he knows nothing about; and as to the reasons for the defendant buying them, I shall advance them in a minute.

Now, consideration was given to the question of the Government taking the patents, we did not go into this thing blindly. Here were these patents held by the Government. Everybody recognized the advisability from every point of view; from the point of view of national defense; from the point of view of industry; from the point of view of public health—everybody recognized the advisability of so to speak "nationalizing" these patents; and consideration was given to the question as to whether the Government, through some agency of its own, could not take these patents and administer them; and that was discussed not only by the Alien Property Custodian and his assistants, but with Mr. Polk and the President, the situation was thoroughly canvassed, and it was determined, not only because the Government is averse to going into business, but because it had no instrumentality that could administer these patents in the way to do most good to the industry.

If the Government had these patents, who would prosecute infringers for them? One of the most important features of the transaction with the defendant was—one of the most important considerations, that there was an agency that would enforce the rights under these patents, would prosecute infringers of them, would prevent the Germans from coming here and re-establishing themselves.

And so it was seen that it was not possible to have the Government take over these patents; and the next step was perfectly plain, namely, to place them in the hands, if not of a public office as near a public office as could be created, a quasi-public office, and so the idea was conceived of organizing this quasi-public corporation, officered, if you will, by officers of the Government. The very fact that every important officer of this concern, when organized, either was a public officer connected with the Alien Property Custodian's office or worked in that office, is an indication of the purpose of the Government that this corporation should have an official standing, a connection with the Government, co-operation with the Government, and why—because its purpose was to carry out the governmental policy.

Now, how did we organize this corporation? How did we know what the industry needed? We turned to the industry and inquired what its requirements were, and right here let me say that it is not the fact that the industry came to the Alien Property Custodian, on the contrary, the Custodian went to the industry. He went to the Dyes Institute, which was the representative body of the dye industry. If anybody wanted to find the sentiment of the bar of this city, they would probably go to the Bar Association of this city. We went to the dye industry represented by the Dyes Institute, and we took up with them the question of how this industry could best be served, and we

had conferences with them, and as the result of those conferences, they drafted a letter directed to the Custodian, in which they outlined the industry's requirements and pointed out how important it was for the preservation of the industry that these patents should be placed in the hands of some one who would be obligated to give each man in the industry an equal chance to use them.

With your Honor's permission, I want to read this letter. It is dated February 7, 1919. It is directed to the Hon. A. Mitchell Palmer, Alien Property Custodian.

"Dear Sir:

The Chemical industries of this country and particularly the dye industry will find itself in a peculiarly critical position so far as the patent situation is concerned, unless steps are taken to relieve the industry of the burden of enemy-owned monopolies.

The Badische Anilin und Soda Fabrik owns nearly five hundred patents in the United States, not one of which has been the subject of any use by an American manufacturing concern. These patents have been held solely for the purpose of preventing manufacturing in this country which might compete with the importation of the German-made article. This situation exists also in connection with the United States patents owned by several other of the large German chemical manufacturers, notably Meister, Lucius & Bruning, the Kalle Chemical Company, Aktien Gesellschaft fur Anilin Fabrikation (Berlin Anilin), Greisheim-Elektron and others. It seems obvious that unless the chemical industry in this country obtains manufacturing rights under these patents upon conditions that would justify their embarking into manufacture, that the German patent owners will be in a position to enforce their monopolies in this country after the war, and to a great extent nullify the efforts which have been

made to establish this industry in this country, independently of Germany. This would imperil an enormous investment made in the establishment of dye and other chemical plants in this country, which amounts, excluding explosive plants, to upwards of $150,000,000, and it might prevent the establishment of a thoroughly American dye and chemical industry, which is universally recognized to be a necessity for the United States.

Under the Trading with the Enemy Act two courses are apparently open to the chemical industry, one, securing license rights from the Federal Trade Commission under Section Ten of the act; and two, the purchase of all the patents outright from the Alien Property Custodian by a holding corporation under Section 7-c as amended and Section 12 of the act. The first of these courses is considered by the trade to be entirely impracticable for the following reasons: (1) It subjects the American manufacturer to a payment of a five per cent royalty to his direct German competitor, thus establishing a ten per cent differential between the American manufacturer and his competitor. (2) The licenses are terminable at the pleasure of the Court, so that a manufacturer is obliged to make a large investment on a mere chance of being able to continue operations or will refrain from making the investment because of the uncertainty of the license."

Your Honor will recall the provision of Section 10 giving the power to the Court to re-arrange the amount of royalty and to extend the licenses or revoke it.

"(3) Licenses under Section 10 require opening of the books of the American companies to German competitors. (4) The rate of royalty fixed by the Federal Trade Commission is a mere tentative rate subject to increase after the war, so that a manufacturer is never certain to what extent his manufacturing cost may be increased.

"The second possible mode of procedure, if regulated in the proper manner is considered by the trade, as represented by this Institute to be the only practical solution. It should be pointed out that under the power of sale vested in the Custodian, he may dispose of the German-owned patents in any way that the actual owner of the patents might dispose of them since he is vested with the entire title thereto. He may therefore either sell the patents in whole or in groups outright to individual manufacturers or he may make a sale under the terms of which the industry as a whole may benefit.

"This Institute considers that the sale of the patents or any part of them outright, without restriction, to an American manufacturer would not effect the desired result, since it would merely substitute an American patent owner for a German patent owner and would thus hamper the free development of the other chemical companies. It is also probable that if a sale of this kind were made, an American purchaser would find himself in possession of a large number of patents which he could not possibly use, because of the limitations of his plant or equipment, but which he would nevertheless monopolize, and that these patents would therefore lie idle, and the industry as a whole suffer in consequence.

"It therefore seems that the greatest benefit to the industry as a whole will be obtained by selling the German-owned American patents in such a way as to entitle any American corporation operating in the industry affected, to obtain manufacturing rights if it desires.

"In order to carry out this plan, this Institute has appointed a sub-committee of its Executive Committee to formulate a proposal to be made to the Alien Property Custodian whereby the desired plan may be put into effect."

And then he goes on to enclose a copy of a proposed organization plan.

MR. ANDERSON: Mr. Kresel, whose is that letter? You did not say who it was from.

MR. KRESEL: The American Dyes Institute.

MR. ANDERSON: I did not catch it.

MR. KRESEL: Signed by the American Dyes Institute, by its President and Secretary, by the Executive Committee. That, your Honor will see, is dated February 7, 1919. This was after conferences had been had between representatives of the Custodian and representatives of the dye interests.

This brings me to a consideration of the organization of this defendant. As stated by Colonel Anderson, this was organized under the laws of the State of Delaware. I may say in passing that the organization of it and the subsequent placing of its stock in a voting trust was under the direction and advice of Judge Gray, of this city, than whom I understand no man stands in higher esteem at the Bar.

This certificate of incorporation provides for the acquisition of these patents from the Custodian, which the Foundation was to hold in a fiduciary capacity for the Americanization of such industries as may be affected thereby, for the exclusion or elimination of alien interests hostile or detrimental to the said industries, and for the advancement of chemical and allied science and industry in the United States.

One need but read the opening statement of the purposes of this corporation to see that it is not a charter of a private corporation acquiring property to do with what it pleases, but that it was a charter given to a corporation that had public purposes, public duties and national duties; because it was to use this property for the elimination of alien interests hostile or detrimental to the industries of this country.

Colonel Anderson says this statement of the trust feature amounts to nothing, nobody can enforce it, that it was a trust void *ab initio*, that this corporation

now having the property can do with it what it pleases. Well, if he means thereby that it has the physical power to do so, of course anybody has the physical power to violate a trust, to break a law, to go back on an obligation. If he asks us who has the power to make us live up to that trust, I say it is the United States Government that has that power, that power this corporation will never question, that power this corporation has admitted before Congressional Committees, a power that we have not only admitted to that extent, but to the extent that we have said to these committees that if there is anything in our structure of organization which, to the mind of Congress, does not meet the situation, we are perfectly willing to have it reorganized.

Indeed, Mr. Garvan, the "arch conspirator" here, said to the Committee of Congress: "All of us are willing to step out, put in your own people; we will do everything that can be done to carry out the purpose that the Government had if this does not carry it out. But there is one thing we will not do—we will not return these patents to the Germans." We took this property in trust and we shall show your Honor that we have carried out that trust to the utmost limit.

The charter provides that the corporation may No fiduciary ever carried out a trust more faithfully. grant non-exclusive licenses only. Note the word "may," said Coloned Anderson yesterday, implying thereby that there was some alternative left to us that we had a right to grant exclusive licenses. On the contrary, the only grant of any power to us to grant licenses, is the power to grant non-exclusive licenses.

If we undertake to grant exclusive licenses we are outside of the four corners of our charter. When the paper says "may grant non-exclusive licenses," it is grant of a power expressed as all other such

powers are expressed. So we have to grant non-exclusive licenses.

Then in our charter we are to grant a license to the United States. But, says Colonel Anderson, they tell you that they have to give the United States a free license, and I do not find anything like that in this charter. Well, I am not going to spend any time in arguing with him on that proposition. The language of the charter is sufficient to bear the construction that we are to give the United States a free license. But whether it is or no, we shall show your Honor that it was a part of the arrangement whereby these patents were conveyed to us that we had to give the Government a free license, and I have in my hand a photostat copy of the license that was given by the Chemical Foundation to the Government. It was a free license, the Government accepted it, and not only accepted it, but accepted it with this recital in it, namely:

"Whereas the Foundation among other things is obligated by the terms and the conditions of the aforementioned sales to it by said Alien Property Custodian to release and forever discharge the Government from any and every claim or demand which the Foundation acquired by virtue of the aforementioned sales for profits and damages recoverable at law or in equity for any past infringement by the Government of any and all letters patent, applications therefor * * * and to grant to the Government free and without cost a non-exclusive and non-assignable license to make, use and sell the inventions covered by any and all letters patent and applications therefor owned or controlled by it."

In other words, in the instrument that we gave them, we recited that we were obligated under the terms and conditions of the sales made to us to give them that free license. And with that recital in the

instrument they accepted it, and accepted it in these words: "The above release and license is hereby accepted according to the terms and conditions thereof"—signed by Theodore Roosevelt, the Acting Secretary of War.

To say to us that we issued a prospectus in which we claim that we had to give the Government a free license and that that was not true, I think is going beyond what the facts will bear out. Not only were we obligated to give the license and to give the Government a release for all past infringement, but we scrupulously observed that obligation. We gave them the release, we gave them the license, and we gave it to them free; and they are exercising the rights under that instrument to this day.

And now under our charter we are obligated to issue non-exclusive licenses.

MR. ANDERSON: Mr. Kresel, would you mind stating the date of that license? I do not know it.

MR. KRESEL: The 17th of November, 1921.

MR. ANDERSON: 1921?

MR. KRESEL: Yes, sir.

THE COURT: Does that cover all the licenses?

MR. KRESEL: It covers all the patents, applications—everything.

THE COURT: That were acquired by the defendant here?

MR. KRESEL: That were acquired by the defendant here.

And as long as the Colonel has asked me for the date, it may not be amiss for me to state the reason for the delay, as we shall show. At first the War Department and the Navy Department came to the Alien Property Custodian and asked him to seize certain particular patents, said the Government needed those for our national defense. Then they started

thinking as to whether they wanted the patents conveyed to the Government or whether they wanted licenses only, and that took them months. They finally decided they did not want the patents conveyed to the Government; they decided they preferred to have a license from the Chemical Foundation and a release from it. Then we said to them, "Now, as to those individual patents that you want, send us a list as to which the Navy Department wants and which the War Department wants." That took time. With 4200 patents to list, and with the schedules which were attached to this list—because this is not the whole instrument, you know, schedules of hundreds of pages were attached to it. It took time. But at no time was there any question but that we were under obligation to give to the Government this free license, and at no time was there any question raised by anybody even suggesting that the Government was not entitled to it and was not to have it.

I say we had to issue non-exclusive licenses, to everybody in the trade, "upon reasonable and equal terms and without advantage as between licensees." And right here I might say that that is an obligation, and we have so carried it out. It obligates us to give a license not only to stockholders of the Chemical Foundation, not only to members of this Dyes Institute, which is so assailed, but to every person in the chemical industry. And that has been the way in which we have administered this trust.

I think Mr. Garvan testified under examination before some one of these investigating committees that there is but one instance where the Chemical Foundation refused to grant a license to a person, and that was the instance where a man applied for a license who had no plant, no factory, and The Chemical Foundation knew that the man's purpose was to use that

license as a basis for a stock jobbing scheme. And they said to him, "No, we will not allow you to use us in your scheme, you go and build a factory, and if you show us you really intend to manufacture you will get a license."

Colonel Anderson said that under this charter the Board of Directors may refuse to issue a license or may revoke any license. Quite true. Every trustee has got to use some discretion. What was there to prevent a man, if there was not that reservation, forcing us to give a license and using it in just the way this man did that Mr. Garvan was speaking of? In every transaction in life you have got to depend on the integrity of the people you are dealing with to some extent.

Who is it that said Otto Bannard and Judge Ingraham, Mr. Griswold and Mr. Dodge and these other men would use this property in any other way than in the strictest sense as trustees, under which they took it? And our record during these three years will show —and the Government has had access to our files and has thoroughly investigated us—that we have scrupulously carried out the trust that was reposed in us, that the industry has prospered, that the industry has benefited by this arrangement, that the Government has benefited by it.

May I say here, because it is in the same connection, that everybody has benefited but the stockholders of this corporation. There were two issues of stock, a preferred and a common. Our charter says that no more than six per cent shall ever be paid on the preferred. Colonel Anderson called attention to that. He did not call attention to the fact that our charter also says that no more than six per cent shall ever be paid on the common. Nor did he call attention to the fact that to this very day neither the preferred nor the common has received a penny on its stock.

This is not a money-making scheme. Indeed, we did not look for the last dollar for this German property; that is not the kind of a trustee this defendant is. We will show your Honor that so far from making any money in this transaction, of the four hundred and some twenty-eight thousand dollars of capital that has been put into this thing, we have used up all but about $30,000.

You can call us extravagant if you wish, but we will show the purposes for which we spent the money. We did not spend it in bribery as the Germans did; we spent it in an endeavor by education to bring home to as many citizens of this country as we could reach the importance of a chemical industry, the necessity of research, the desirability of sustaining universities and colleges which had courses in chemistry, the importance of the industry for our national defense and for our public health.

This trusteeship is for a period of seventeen years. We make it seventeen years in order to cover the life of the youngest patents, and we selected as trustees men who are entirely disassociated with the industry. We did not want to give anybody an opportunity to say that it was the industry that was using this as a monopoly. These voting trustees are self-perpetuating. They control the corporation, they elect the directors. We went further and said we will not permit any aggregation among our stockholders to control here. And so we have adopted the rule that no stockholder shall have more than two shares of the common stock of the company. Your Honor will find that there is not anybody owns more than two shares of our stock.

We threw around this corporation every safeguard that the fertile brain of Judge Gray and Judge Ingraham and the other legal advisers of the corporation could think of, to prevent just the very thing

that the Government is now claiming, namely, to prevent substituting an American monopoly for a German monopoly, and we think we have succeeded. And then this corporation by its charter has a duty which Colonel Anderson did not dwell upon, namely, "It shall be the duty of the corporation to defend and enforce the rights acquired by it."

Think of that. This corporation imposing upon itself the duty to defend these patents. That was put in to meet the very situation that I pointed out, where a private owner might take these patents, put them in a safe, forget them, and let the Germans bring in their stuff.

We are under a duty by our Charter to prosecute infringements because that is the only way that this industry that has been created here will be able to survive. You give this industry another three or four years and it will stand erect on its own feet, and even the German monopoly will not be able to touch it.

Now, the sale was made at private sale, under this Section 12, as amended March 28, 1918, which gives to the President the right to make any disposition of the property "by sale or otherwise and exercise any rights or powers which may be or become appurtenant thereto or to the ownership thereof in like manner as though he were the absolute owner thereof."

The Government contends that the provision for the method of sale, namely, that it should be at public auction, is modified by the provision reading, "unless the President stating the reasons therefor in the public interests shall otherwise determine" — that that modification applies only to the method of sale. That was his argument. That is to say, the Government contends that the President, under that proviso, has no right to say that the property shall not be sold to the highest bidder.

How the President—

MR. ANDERSON: Mr. Kresel, I know you do not want to misrepresent me. I said that the President's duties under that related to the four things set forth. He could change any one of them or all of them.

MR. KRESEL: So far from desiring to misquote you, Colonel, I am always careful, and I shall read to you what you said:

> "The President's power" (I read from Page 127, at the bottom of the page) "The President's power is limited to three things. When he finds it in the public interest and so determines, and states his reason therefor, to substitute a private for public sale, to substitute a private sale without advertisement, to advertise if he desires at some place other than where the property is located and, if need be, to sell to other than citizens of the United States."

MR. ANDERSON: Then I went on to say further—

MR. KRESEL: Wait a minute. I am going on.

> "Those are the four things that are required and those are the four things as to which the President is given power. But always it is a sale—there is not a suggestion of anything else; always there is a sale by a trustee, because the same section provides that the Alien Property Custodian is a trustee, and, of course, the terms of the Act make him a trustee whether it says so or not."

And then later on he says:

> "In the last analysis it must be a sale under fair terms, and a fair consideration or it is invalid"—

MR. ANDERSON: You will find that I discussed the provision permitting the President to set aside the sale and order a new sale.

MR. KRESEL: Right. Now I say that the Government does not concede, and if it does, I would like to know it now, that under this proviso, namely, that

> "unless the President stating the reasons therefor in the public interests shall otherwise determine,"

I understand that the Government does not concede that under that the President can sell and not to the highest bidder.

I say that I cannot see how you can have a private sale and yet be obligated to sell to the highest bidder; but be that as it may, the argument is that the proviso always speaks of a sale. No question about that, Colonel, is there?

MR. ANDERSON: That is all right. I stick to that.

MR. KRESEL: I say that that is wrong, because the statute says:

> "That the President may make any disposition thereof or any part thereof by sale or otherwise"—not only a sale—"by sale or otherwise."

We cannot just forget this word "otherwise," and under that provision, I say that the President has a right at private sale to fix whatever price he deems proper; and I say that in the war—and the purpose of it was to put into the hands of the President a war power, he had the right to take this property and put it to a war use, regardless of whether he received the highest consideration or no.

THE COURT: It is now 11:45. What is your pleasure, Mr. Kresel? To finish?

MR. KRESEL: Your Honor, I am perfectly willing to do whatever your Honor desires. It is time now for the regular adjournment. I think perhaps it might be better if we did take our adjournment.

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AFTER RECESS

MR. KRESEL: If your Honor please, during the recess my attention was called to the fact that in speak-

ing of the license given by the defendant to the United States and in calling attention to the acceptance thereof by Mr. Theodore Roosevelt, I read as his office the Acting Secretary of War. That was an error. That should be the Acting Secretary of the Navy.

And while I am speaking of that, may I call your Honor's attention to the fact that this license was accepted by the Government in November, 1921, long after the passing of the Administration that is responsible for the transaction involved in the conveyance of these patents. And, moreover, I am informed that since the bringing of this suit the Government has sent this particular license to the Patent Office for recording, and that the original is now in the Patent Office.

I mention that, if your Honor please, in its bearing upon the suggestion made yesterday by Colonel Anderson, when he accounted for the delay of three years since this transaction was put through, the delay of three years before this action was brought, when he said that of course up to March, 1921, the Administration in power was the Administration that was responsible for the transaction.

Here we have an Act of the present Administration, an acceptance by the present Administration, of an instrument which on its face recites that it is given in order to fulfill the conditions and the terms of the sale; and I venture to suggest that if there is anything in the doctrine of ratification a court might well take into consideration whether that is not a ratification by the Government.

The Government attacks the validity of the transaction as a matter of law. They say first that the power to dispose of property, granted to the President by the Act of March, 1918, is a power that he cannot delegate; second, that if he could delegate it, the dele

gation to Mr. Polk was void, and therefore the Executive orders made by Mr. Polk were without authority.

Section 5 of the Trading with the Enemy Act defining powers of the President under the Act, says:

"And the President may exercise any power or authority conferred by this Act through such officer or officers as he shall direct."

I have read diligently the report of Colonel Anderson's statement in this connection, and I fail to find any ground assigned by him upon which he bases the contention that the President had no right to delegate this authority.

The Act itself is perfectly plain. It says "that the President may exercise any power or authority conferred by this Act." The power and authority to deal with the German property is granted in this Act by Section 12 thereof, so it seems to me perfectly plain from a clear reading of the Statute, that that is one of the powers that the President was authorized by the very Act to delegate to any officer or officers.

And in that connection I call your Honor's attention to the recent decision of the Supreme Court entitled "Commercial Trust Company of New Jersey against Thomas W. Miller, as Alien Property Custodian," in which the question was raised as to the power of the President to delegate to the Alien Property Custodian the right to make the determination of enemy status which must be the basis of any seizure of enemy property. That certainly is a power at least as important, at least as sacred, as the power to dispose of this property for war purposes according to the amendment.

Mr. Justice McKenna, writing for the Court, says:

"They decide"—referring to certain cases that he had mentioned—Central Trust Company against Garvan and Stoehr against Wallace—"they decide that

the President's power under Section 5 of the Act may be delegated to and exercised by the Custodian and that the determination of the Custodian is conclusive, whether right or wrong."

And then to point to the basis for the statement, Mr. Justice McKenna puts a star after that statement, and at the bottom of the page puts the following note:

"By Section 5 the President is in terms authorized to exercise *any* of his powers"—quoting the word "*any*"—"Through such officer or officers as he shall direct."

I pass therefore from the unsupported contention that the President had no power to delegate, and come to the question of whether the delegation was a proper and valid one. The argument there is that Section 5 provides that the President may exercise any of his powers through an officer, and that in this instance the Executive order of the 3rd of December, 1918, says:

"I vest in Frank L. Polk"—without saying after "Frank L. Polk" "Assistant Secretary of State" or "Under Secretary of State," whatever his legal title was.

Now, there is no doubt that Mr. Polk was an officer, and the Courts have held that they will take judicial cognizance of who are officers of the United States. Indeed, they have gone so far in one case as to hold that they will take judicial cognizance of who is the consul in a foreign port.

So we start with the proposition that the delegation of this power was to an officer of the United States, and a high officer in the Government at that. He was not only Under Secretary of State, but during the period of the President's absence in France and Mr. Lansing's absence there, he was the Acting Secretary of State. Colonel Anderson referred to him as

the "Acting President." I do not know whether he meant that in a serious or in a comic vein, but he was the Acting President in the absence of the President and the Secretary of State. So we have it that the delegation was to an officer of the United States, and he was an officer under the definition that Colonel Anderson invokes, namely, that he was the holder of an office by appointment of the President, by and with the advice of the Senate.

So we have the delegation to an officer of the United States, and we say that the omission of the words "as Secretary of State" or "Acting Secretary of State" or "Under Secretary of State" is absolutely immaterial. Indeed, we say that there is no requirement in the law that the designation or the delegation should be in writing. The President could well have called Mr. Polk to his office and have delegated the power to him verbally, and does anybody seriously contend that if the President had said: "Polk, I want you to do thus and so," that that delegation would be unenforceable, because he did not say: "Polk, Under Secretary of State, I want you to do thus and so"? The Statute says the delegation should be to an officer of the United States. Indeed, that language is subject to the interpretation that the President could by the very delegation, create that office. It does not say to an existing officer. It says that he may exercise the power or authority through such officer or officers as he shall direct.

Now, the suggestion that the President might have picked up somebody passing the White House at the particular moment and have entrusted him with this important duty is hardly worth while answering. Nobody would for a moment contend that any President would so far forget the duties of his office as to violate a Statute of Congress, or to entrust any power given to him by Congress to a person not connected

with the Government at all; and while the delegation is to Mr. Polk, without mentioning his title, of course, it follows that if Mr. Polk had resigned his office, that he could no longer have exercised this power, because then he would no longer be an officer, and the Statute would not be complied with.

But there was a good reason, a very good reason, why the President did not give this power to the office of Assistant Secretary of State; he gave it to the person that occupied that office.

Colonel Anderson called attention to the fact that in all other delegations of power by the President it was a delegation to the office—the Secretary of War, the Secretary of the Navy, the Federal Trade Commission, War Trade Board. This one was to Polk.

I say the President no doubt had good reason for putting it in just that way. He wanted to know who it was that was going to exercise this executive power granted to him by Congress while he was abroad. And apparently he was unwilling to run the risk of having this power exercised by anybody who might at some particular time happen to occupy the office of Assistant Secretary of State. And who will deny that under this Statute the President was not only authorized, but indeed in the discharge of his duties he should have taken good care that that power should be exercised by a person in whom he had the utmost confidence?

It seems to me that when they say the name of the office is not appended or added to the name of Mr. Polk that that is immaterial. Would anybody claim, for instance, that the President's letter directed to Colonel Miller, the Alien Property Custodian, which is annexed as an exhibit to the Bill of Complaint here and which refers to the bringing of that suit—would anybody claim that because it is signed "Warren G. Harding" and not "Warren G. Harding, President."

that that was not an official document and an act of Warren G. Harding as President?

And so Mr. Polk, authorized by this executive order of December 3, 1918, made the two orders of February 26 and April 5, 1919. Now we shall show your Honor that when Mr. Polk made those orders he was in possession of all the facts, all of the facts that surround this transaction; that he knew the price, that he knew the person to whom the conveyance was to be made; that he knew what patents were to be conveyed; that he knew the reason for the conveyance; that he knew the purposes of the new corporation; that he knew that Mr. Palmer had arranged for the matter, and that he knew that Mr. Garvan was to be president of the new corporation.

I say he knew all that, as we shall show, and we shall show that he knew it not only through personal interviews with Mr. Palmer, but he knew it because it appeared in Mr. Palmer's report to Congress, which was submitted to Mr. Polk at the time when he was asked to sign the first order of the 26th of February, 1919.

I shall have occasion to read to your Honor a portion of that report of Mr. Palmer. I pass now to the proposition that after Mr. Polk had made these orders the President ratified them. And in that connection I say that the President knew all the facts when he ratified them; that he knew everything that Mr. Polk had known about this transaction; that he was not only in thorough sympathy with the purposes of the transfer, but that he had been conferred with as to it before the orders were made; that he knew what the purchase price was to be; that he knew what was to be conveyed; that he knew Mr. Garvan was to be the president of the new corporation.

Indeed, we shall show your Honor that Mr. Garvan was appointed by the President for the very purpose

of carrying out the arrangement that Mr. Palmer had made for the transfer of these patents to The Chemical Foundation; that it was the President's purpose to have Mr. Garvan Alien Property Custodian and at the same time president of this corporation, so that the intimate touch between the corporation and the Government should be preserved. And we shall show your Honor that when Colonel Miller was appointed Alien Property Custodian, Mr. Garvan went to him and told him that he thought it was for the best interests of The Chemical Foundation and the chemical industry, and therefore for the country, that he, Miller, as Alien Property Custodian, shall be connected with The Chemical Foundation; that he offered him a directorship in the corporation and that he accepted it; that he was to be made vice-president of the corporation and he accepted it; and that Mr. Garvan, further, told him that just as soon as he was sufficiently familiar with the workings of that corporation and the purposes of it, he, Garvan, thought that he ought to step out and have Mr. Miller succeed him as president, because he thought the Administration and The Chemical Foundation should work together, and, inasmuch as he, Garvan, was not of the political faith of the present Administration, it might be better for all concerned that Colonel Miller, who was, should succeed him as president.

Now, the President knew these facts, I say, not only from personal interviews with Mr. Palmer, but from this report. And that brings me to the report, your Honor, and I am going to so far impose upon your patience as to read a portion of it, because, as I said in the beginning, the action of the Government was predicated upon this report that was the result of the investigation conducted by Mr. Choate.

We shall show your Honor that this report was made by Mr. Palmer as Alien Property Custodian, to

the President. It is quite a document, as your Honor will see. The text of it is not so much, but there are exhibits which make it quite voluminous.

That report is accompanied with a letter of transmittal from Mr. Palmer to the President, and that letter is dated February 22, 1919.

Your Honor will recall Colonel Anderson brought out yesterday that the President returned to the country on the 25th of February, 1919. It will appear, I think, that this report, though the letter is dated the 22nd of February, was sent to the President about the 26th or the 27th of February.

Certain it is that on March 1, 1919, the President sent this report to Congress, and the Congressional Record shows the receipt of the report by Congress and its reference to the Judicial Committee with instructions to print it as a public document.

If, as a matter of fact, this report shows all the details of this transaction in the form of a report by the man that had put the transaction through, and the report is made to the President and the President adopts it as his own and sends it to Congress, is it a far-fetched argument to say that thereby the President adopts the transaction and ratifies and confirms it?

If in point of fact, the President knew about this transaction, and, having this report before him, which contains a full report thereof, he accepts the report and sends it to Congress, is that not in itself a confirmation by the President?

But we do not have to rely upon that, because on the 13th of February, 1920, the President expressly ratified and confirmed these transactions in the order of ratification over his own signature. And so, with your Honor's permission, I want to read to you a portion of this report to support my argument and my statement that this report contained all the details of the entire transaction, that it became a public docu-

ment as early as March 1, 1919, more than a month before the first assignment of a single patent was ever made to this corporation.

And so I read from Mr. Palmer's report as follows—this appears at the end of the section of the report which is entitled "Chemical Industry":

> "The amendment of November 4th to the Trading with the Enemy Act presented for the first time an opportunity for what appears to me to be the most important piece of constructive work which has been possible in my department. Until the enactment of this amendment it had not been possible to take over German patents. These patents, as had been already indicated, formed a colossal obstacle to the development of the American dyestuff industry. Evidently they had not been taken out with any intention of manufacturing in this country or from any fear of American manufacture, which the Germans apparently thought could not be successfully carried on under conditions prevailing in this country in regard to costs and to the supply of technicians and skilled labor. Upon consideration, however, it seemed that these patents offered a possible solution for the problem, hitherto unsolvable, of protecting the new American dye industry against German competition after the war. If they were not taken out in order to prevent American competition, they must have been obtained as a weapon against competing imports.
>
> "If they were sufficient to stop importation of competing Swiss, French and English dyes, they would presumably serve, in American hands, to stop the importation of German dyes. This was particularly probable in the case of the product patents, since most of the coal-tar dyestuffs are definite chemical combinations to which a product patent is entirely applicable.
>
> "The idea was accordingly conceived that if the German chemical patents could be placed in the hands of any American institution strong enough to protect them, a real obstacle might be

opposed to German importation after the war, and at the same time the American industry might be freed from the prohibition enforced by the patents against the manufacture of the most valuable dyestuffs. Accordingly, these considerations were laid before various associations of chemical manufacturers, notably the Dyes Institute and the American Manufacturing Chemists' Association."

The "conspirators," your Honor, telling about the whole of the conspiracy to the President and to Congress—

"The suggestion was met with an instantaneous and enthusiastic approval, and as a result, a corporation has been organized"—

They are speaking in the past now—

"A corporation has been organized to be known as The Chemical Foundation (Inc.), in which practically every important American manufacturer will be a stockholder, the purpose of which is to acquire by purchase these German patents and to hold them as a trustee for American industry,"—

Quoting, your Honor—

" 'For the Americanization of such industries as may be affected thereby, for the exclusion or elimination of alien interests hostile or detrimental to the said industries and for the advancement of chemical and allied science and industry in the United States.' "

And that quoted part was taken directly from the charter of The Chemical Foundation.

"The voting stock is to be placed in a voting trust of which the trustees are to be the five gentlemen who for months have been acting as the sales committee which passes upon sales made by my department, that is to say, George L. Ingra-

ham (former presiding justice of the Appellate Division, First Department, New York Supreme Court); Otto T. Bannard (President, New York Trust Co.); Cleveland H. Dodge; B. Howell Griswold, Jr. (senior partner of Brown Bros., bankers, Philadelphia); Ralph Stone (president, Detroit Trust Co.), and the charter is so framed that under the patents non-exclusive licenses only can be granted on equal terms to all proper applicants, and must be granted to the United States free of cost."

Permit me to stop there for a minute to say that this Advisory Committee, consisting of the five gentlemen named, were originally appointed to this Advisory Committee by the President himself. To be sure he did not designate them as the voting trustees under this voting trust, but their official position with the Government was an official position given to them by the President of the United States, and will your Honor note also please that in this report Mr. Palmer says that The Chemical Foundation must grant a license to the United States "free of cost"?

That was written in February, 1919, before any of these patents were conveyed to The Chemical Foundation, indicating, as I have stated, and as the preamble to the free license actually shows, that that condition for a free license to the Government was one of the conditions of the original transaction and a part of the consideration.

The report goes on to say:

"The Company is capitalized at $500,000, of which $400,000 is to be 6 per cent cumulative preferred stock and $100,000 common stock, also limited to 6 per cent dividends. The first president of the Chemical Foundation (Inc.) will be Francis P. Garvan, of the New York bar, to whose clear vision and indefatigable industry I am chiefly indebted in the working out of this plan."

Remember, your Honor, this was written in February, 1919, while Mr. Garvan was still only a Director of the Bureau of Investigation in the office of the Alien Property Custodian. He did not become Alien Property Custodian until March 4, 1919; but here is the plain statement to the President, to Congress, to the whole country, that Francis P. Garvan, was to be the first president of The Chemical Foundation.

"By Executive order obtained under the provisions of the Act"—"obtained," speaking in the past, your Honor—"obtained under the provisions of this Act, I have sold to this Company" — speaking of it again as an accomplished fact, and I dwell upon that because of the criticism that was unjustly directed against Mr. Garvan, that in this transaction he acted in a dual capacity, that he was both buyer and seller. According to this official report, the transaction was made before Mr. Garvan became Alien Property Custodian. "I have sold to this Company for the sum of $250,000"—there is your consideration expressed—

> "Approximately 4500 patents, the remaining $250,000 has been provided for working capital, so that the company may be able to commence immediately and prosecute with the utmost vigor infringement proceedings whenever the first German attempt shall hereafter be made to import into this country."

The charter of the corporation provides that surplus income is to be used for the retirement of the preferred stock and thereafter for the advancement of chemical and allied science and industry. And when your Honor reads the charter of the corporation, you find it says:

"After the full redemption of the preferred stock the net earnings of the corporation over and above such amounts as may be necessary for the purpose of

working capital shall be used and devoted to the development and advancement of chemistry and allied sciences in the useful arts and manufactures in the United States."

Think of a private corporation binding itself by its charter to devote all above its running expenses, all of its profits and expenditures, for the advancement of chemical industry and science in the United States. "The price thus paid," says Mr. Palmer in this report, "was necessarily determined somewhat arbitrarily. The great majority of the patents were presumably worthless."

Permit me to stop here. Much was said yesterday about the purchase price having been arrived at arbitrarily. Well, that is no secret. We published it to the world before the conveyance was made. But what does the word "arbitrarily" mean? Does it mean any more, as Mr. Palmer will explain to your Honor, than the fact that there was no way of determining what each of these patents was worth? It was an impossibility, notwithstanding the German expert who undertook to tell your Honor here that certain fifty-eight patents were worth $17,000,000. I say to your Honor, and we shall show it, that there was no possible way under heaven to decide how much each of these patents was worth, but that all of the considerations that entered into the question of value, applied to all of the patents, in view of the purpose to which they were to be put, in view of the purchaser and the way it was to use them—that that was the only way value could be arrived at. But here is Mr. Palmer in his official report saying to the President and to Congress that this consideration of $250,000 was somewhat arbitrarily arrived at because the great majority of the patents were presumably worthless.

We shall show your Honor that less than ten per

cent of these forty-two or forty-five hundred patents that they talk about have ever been inquired about by anybody, have ever attracted anybody to come to us and ask us for a license to work under them. In other words, ninety per cent of them are there in our possession, apparently valueless, apparently, because of the conditions of them, because of the inability to work them, unable to attract any capital to try and make use of them.

"The value of the remainder was entirely problematical," says Mr. Palmer, "and impossible to estimate. Substantially the entire industry having combined for the purpose of this purchase it would have been impossible at public sale to find as a bidder any legitimate manufacturer."

That brings me to a comment upon the argument made yesterday by the Colonel, that he had burnt the midnight oil to try to find an authority or a reported case in which it was ever argued to a Court that because the bidders had combined, that a sale should be confirmed, in as much as there were no other bidders, and he stated that if for no other reason, for that reason this sale ought to be set aside.

The trouble is with the point of view of the Government. Colonel Anderson very justly summarized it yesterday and I will take the opportunity to read his summary of the two conflicting contentions, but substantially it was that we contend that this property was to be used for the people; but he contends that the property ought to be used for the Germans. Now, I know he did not say the Germans. Colonel Anderson would not stand up here and say that it is the purpose of the Government to return this property to the Germans. I think I shall show your Honor and perhaps even convince my learned friend on the other side, that if the Government should succeed in this

suit, it is inevitable that these patents shall go back to the Germans—but that in good time.

But I say, as to the combination of the bidders, if we are right, that this was a war use of enemy property by the President under the war powers given to him in a Statute which said to him: You can do with this property anything that you could do with it if you were the absolute owner of it. If it was to be devoted, as we say to the development of the chemical industry of the country, then it made no difference whether there was a combination of bidders or no; it made no difference, just as long as the ultimate purpose was served, namely, that these patents should be placed at the disposal of the Government and the industry for the advancement of the industry and, of course, the advancement of the Government.

But here, in this public report, this "conspiracy" is revealed in its darkest hue. It is set forth that, "The value of the remainder was entirely problematical and impossible to estimate. Substantially the entire industry having combined for the purpose of this purchase,"—Mr. Palmer goes on to say: "No other bidder could, therefore, have been found on public sale except some speculative individual who might have bought them for purposes practically amounting to commercial blackmail. The combination was not objectionable to public policy"—Mr. Palmer was looking ahead almost with prophetic vision, because apparently he had in mind that someone might claim that the combination was objectionable to public policy, and so he points out that, "The combination was not objectionable to public policy since it was so organized that any genuine American, whether a stockholder of the company or not, could secure the benefits of the patents on fair and equal terms."

"It is submitted"—says Mr. Palmer—"that the organization of this institution constitutes the most

important step that has been taken for the protection of the new industry. Tariff protection has proved utterly unavailing in the past. The German industry as hitherto organized, and still more as now organized, has had so much to gain by extending its foreign trade and by destroying the industry in other countries that it would undoubtedly give away its goods in this country for nothing in order to recover the American market. The Chemical Foundation, however, should prove a power sufficient to discourage in a most effective manner any German attempts in this direction. If, as their newspapers boast, the Germans have during the war worked out entirely new dyes superior to their past productions, the protection afforded by it will be invaluable."

Talk about consideration with that in mind.

"It has been the uniform experience of the industry that the introduction of new classes of dyestuffs follows only several years after the patenting of the original inventions on which their manufacture depends. Accordingly, the later dyes of today depend largely upon the patents of three or four years ago. The patents transferred to the Chemical Foundation include many German patents of 1917 and even of 1918, and also many applications still pending. These patents undoubtedly include the results of the research upon which must be based the manufacture of any new dyes which the Germans are now able to produce and market. Accordingly, at the very least, the institution will be able to protect the American industry for a considerable period, and this should be all it needs. It appears to be the universal view of the more competent manufacturers in this country that, given five years of freedom from German competition, the American industry can hold its own. Probably only a measure such as the embargo which appears to have been imposed by the British and French against all

foreign dye importations can furnish this protection to the degree necessary to insure the safety of the American industry; but short of such an embargo, the Chemical Foundation would seem to furnish all the aid that possibly can be given.

"At the same time the new institution promises an incalculable benefit not only to the dye and chemical industries but to the whole American manufacturing world. The opportunities which it can offer and the rewards which it can hold out to competent research scientists should far exceed those of any institution unconnected with industry, and it may well, therefore, form the nucleus of the greatest research organization in the country."

Now, that report, your Honor, was before Mr. Polk when he put his pen to the paper to sign his name to the first executive order, namely, the one of February 26, 1919. And who shall say that with that report before him there was a single essential fact in connection with this transaction that was not laid before him?

When the President ratified Mr. Polk's orders on February 13, 1920, he had not only learned from personal interviews with the Alien Property Custodian all about this transaction, but he had had this report before him before March 1, 1919, when he sent it to Congress; and we shall show that when the President went abroad early in March, 1919, Mr. Palmer was careful enough to see to it that a copy of this report was given to a gentleman in the President's party, with instructions to see to it that the President got it and read it on the way over; and we shall show that the President did read it and knew all about it before he ratified this act.

Was there any concealment about this transaction? Did the Alien Property Custodian and these "conspirators," of the American Dye Institute, go

somewhere and lock themselves in a room and put this transaction through?

Is it the act of people that are acting not in good faith to publicly set forth in a public document and publish to the world every detail of the transaction? Or does it show that everybody concerned in this transaction was actuated with the highest motives, that their interest was solely for the good of the Government and the people?

But they say that the President had no right to ratify. They say that Mr. Polk's order was a nullity and was void; and that there are authorities to the effect that you cannot ratify a void Act.

There is a difference in law between a void act and an unauthorized act. We do not concede that Mr. Polk's act was unauthorized, but assuming for the purposes of the argument that it was, it was an act that the President could have performed himself, and it is well recognized law that you can ratify anything that you could have done yourself.

The Supreme Court in Marsh versus Fulton County, 10 Wallace 676, says:

> "A ratification is in its effect upon the act of an agent equivalent to the possession of him by a previous authority. It operates upon the act ratified in the same manner as though the authority of the agent to do the act existed originally."

This act of Mr. Polk, even assuming that the delegation was inoperative because his official title was not added to his name, was at most unauthorized, and the President had a perfect right under the law to come back and say, "I adopt it and ratify it because I myself could have done the act." It is far different from a transaction which is void *ab initio*. A man may not be able to ratify a forgery, for instance.

Moreover, as to the President's knowledge of the situation of the chemical industry, I desire to direct your Honor's attention to something that your Honor will take judicial cognizance of, namely, a message of the President to Congress. Bear in mind, your Honor, that the President was abroad between March and, I think, September, 1919.

MR. ANDERSON: June.

MR. KRESEL: Was it June?

MR. ANDERSON: Late in June.

MR. KRESEL: Late in June, 1919—and indicating that he was fully alive to this chemical situation, I quote from a message of the President to the Congress sent by wireless when the Congress was considering tariff legislation. It is under date of May 20, 1919. See how closely in touch he was with the situation. He was over there trying to make peace. The President says this:

> "The experiences of the war have made it plain that in some cases too great reliance on foreign supplies is dangerous and that in determining certain parts of our tariff policy domestic considerations should be borne in mind which are political as well as economic. Among the industries to which special consideration should be given is that of the manufacture of dyestuffs and related chemicals. Our complete dependence upon German supplies before the war made the interruption of trade a cause of exceptional economic disturbance. The close relation between the manufacture of dyestuffs on the one hand and of explosives and poisonous gases on the other, moreover, has given the industry an exceptional significance and value.
>
> "Although the United States will gladly and unhesitatingly join in the program of international disarmament, it will nevertheless be a policy of obvious prudence to make certain of the successful maintenance of many strong and well-equipped

chemical plants. The German chemical industry, with which we will be brought into competition, was, and may well be again, a thorough monopoly capable of exercising a competition of a peculiarly insidious and dangerous kind."

Think of that language from President Wilson abroad, sitting at the peace table, face to face with the Germans, trying to arrange an end of a war that had drenched the world in four years of bloodshed! He was thinking, not of reparations; he was thinking of what could be done for that key-industry in our country, which is the basis of the explosives, the poison gas—the dye industry of the country; the industry that any nation that wants to survive must have in the future; and he, a Democrat and not a protectionist, was advising a Democratic Congress that in considering tariff legislation, they must take care to protect this key industry, because he saw with almost supernatural vision that therein lay the safety of the country; that the dye factories were the potential arsenals of any future war. Can it be denied that when he, eight months thereafter, ratified this very act of the transfer of these patents, he did so with a complete and full knowledge of the importance of the step and the purpose that it was sought to subserve?

But, then, they say—true there is a confirmation by the President, but the confirmation does not confirm everything; that the confirmation covers only the conveyance of certain choses in action. Well, I shall not spend much time in a discussion of that, except to point to the language of the confirmation, and it reads as follows. Your Honor will please turn to page 119 of our Answer—I shall read only that part of it which covers the confirmation of previous parts. It says:

"The Alien Property Custodian is also hereby authorized in the case of sales heretofore made by him of any property which he is hereby authorized to sell, but as to which his authority to sell the same under the said orders of February 26, 1919, and April 5, 1919, may be deemed doubtful to confirm and ratify the said sales by the execution and delivery of a suitable instrument of confirmation."

It may well be, and we may admit, that some of these instruments might have been better drawn. It may well be, and we may now admit, that if we had had in mind that any administration would ever come into a Court to seek to set aside this transaction, we would have been more careful in crossing our t's and dotting out i's in this transaction. We would have acted as conspirators would act. We would have taken no chances with instruments of ratification and confirmation. We would have seen to it that there could not ever be a semblance of an argument based upon what they please to call the dual position of Mr. Garvan, both as president of The Chemical Foundation and as Alien Property Custodian. But the very fact, your Honor, that they are able to point to these so-called imperfections in our coat of armor indicates the good faith in which we were acting. This was not a transaction at arm's length between the Government and some outsider. This was a transaction between the Government and its own creature. We say this Foundation is as much a creature of the Government as the Sugar Equalization Board, for instance, was during the war, where they organized a Delaware corporation and took all the stock into the United States Treasury.

"This ratification and confirmation ratifies any sales heretofore made by him of any property which he is hereby authorized to sell, and

> he is hereby authorized to sell all choses in action, the rights, interests and benefits under agreements and rights in claims of every character and description which the Alien Property Custodian may seize."

If we are going to split hairs and stand on narrow legal constructions, "choses in action" certainly include patents. The Courts have held that a patent is a chose in action. What more is it than the basis upon which a litigant can go into a Court and seek its relief against an infringer? But is there any question but that the parties interested in the transaction from the President down understood that it was the purpose by this instrument to ratify the sales made under Mr. Polk's orders? The orders are mentioned and described by dates—February 26th and April 5th—and the February 26th one covered all the patents; and then under the power thus granted to him by the President, the Alien Property Custodian did execute an instrument of confirmation, which in its terms has not been criticized; which is an instrument that directly and specifically confirms every transfer of patent application and copyright that had theretofore been made by the Alien Property Custodian to The Chemical Foundation.

Now, your Honor will have observed that I have confined myself strictly to a discussion of facts. It had been the intention, and if your Honor desires it, it will be carried out, to have Mr. Guthrie outline to your Honor the questions of law that are bound to arise in this long trial; but owing to the length of time that your Honor has devoted to hearing opening statements of counsel, we thought that perhaps it would be better if I were to outline to your Honor the most important question of law from our point of view that will arise in this case. I say it is the most im-

portant, but I say at the same time that it is not the only one, and the question that we present to your Honor is—that this is a case that involves an exercise of the power by the President over which the Courts have not jurisdiction and which they have heretofore declined to review. Expressing it in more formal language, it is what is known in the law as a non-justiciable question. It is the exercise of power by the President under a war act, the exercise of a discretion that was committed to him by Congress, which the Courts heretofore have held to be a matter with which they will not interfere, and if you will bear with me, I will call your attention to two or three of the leading cases on the proposition; and I am happy to say that we have been able to find a decision made by this Court involving the same question.

In the first place, it is now settled by the decision of the Supreme Court in Stoehr vs. Wallace, in 255 U. S., that the Trading with the Enemy Act is strictly a war measure and finds its sanction in that provision of the Constitution which empowers Congress "to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water." And may I be pardoned if I quote the language of President Wilson in connection with the purposes of this measure in this war, when he said that "this is a war of resources no less than of men, and perhaps even more than of men."

The Courts have also held that the Armistice did not put an end to the war and have expressly pointed out that the Trading with the Enemy Act survived the war. This was decided by the Supreme Court in the recent decision that I quoted this morning, Commercial Trust Company of New Jersey vs. Miller, decided at the October term of the Court on April 23rd of this year.

Congress gave the President power to decide

whether a public sale of enemy property should or should not be had in accordance with what the public interest required. He decided in this case, as he did in many other instances, that there should be a private sale. It is our contention that the Courts will not review that decision either upon the question as to whether it should or should not be a private sale or upon any other question involved in the transaction—conditions, price, terms, time or place; the decision under the Act of Congress lay with the President in the exercise of a war power which the Courts hitherto have held to be beyond the power of the Courts to review.

The first case, the leading case upon this proposition, is, as your Honor no doubt well knows, the case of Martin vs. Mott, in 12 Wheaton, at page 19, in which Mr. Justice Story wrote for the Court. In that case the Courts were asked to review the exercise of the President's discretion as to whether such a situation existed in a particular state as to authorize the President to call out the militia. The Supreme Court said no, that that was the exercise of a power entrusted to the President under the Constitution which the Courts would not review. And before I read the extract from the opinion of the Court, if your Honor will reflect, you will see the wisdom of the rule of law established by the Courts in this particular.

The President acts in matters of state upon many considerations and things that might be utterly ruinous to the country's interests to divulge. He acts upon information that comes to him in a confidential capacity that might be more injurious to the country to disclose than it would be to carry through the act complained of. The President cannot be dragged into a court of law or equity to give account, to state the reasons which actuated him in taking some executive

action in a matter entrusted to him by the Constitution or the Statute.

But the Court expressed it in much better language than I can. Mr. Justice Story said:

"Is the President the sole and exclusive judge whether the exigency has arisen, or is it to be considered as an open question upon which every officer to whom the orders of the President are addressed may decide for himself and equally open to be contested by every militiaman, who shall refuse to obey the orders of the President? We are all of opinion that the authority to decide whether the exigency has arisen belongs exclusively to the President, and that his decision is conclusive upon all other persons. We think that this construction necessarily results from the nature of the power itself and from the manifest object contemplated by the Act of Congress. While subordinate officers or soldiers are pausing to consider whether they ought to obey or are scrupulously weighing the evidence of the facts upon which the Commander-in-Chief exercises the right to demand their services, the hostile enterprise may be accomplished without any means of resistance. Besides, in many instances the evidence upon which the President might decide that there is imminent danger of invasion might be of a nature not constituting strict technical proof or the disclosure of the evidence might reveal important secrets of state which the public interest and even the safety might imperiously demand to be kept in concealment. The law does not provide for any appeal from the judgment of the President or for any right in subordinate officers to review his decision and in effect to defeat it. Whenever a statute"—here is the language: "Whenever a statute gives a discretionary power to any person to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the

sole and exclusive judge of the existence of those facts.

"And in the present case we are all of opinion that such is the true construction of the Act of 1795. It is no answer that such a power may be abused, for there is no power which is not susceptible of abuse. The remedy for this, as well as for all other official misconduct, if it should occur, is to be found in the Constitution itself. In a free government the danger must be remote, since, in addition to the high qualities which the executive must be presumed to possess, of public virtue and honest devotion to the public interests, the frequency of elections and the watchfulness of the representatives of the Nation, carry with them all the checks which can be useful to guard against usurpation or wanton tyranny."

And then your Honor will certainly recall your Honor's own decision in Dexter & Carpenter, Inc., v. United States, reported in the 275th Federal Reporter, at 566, in which your Honor was called upon to construe the President's power under the so-called Lever Act:

Acting under the Statute, the President had taken the plaintiff's coal for the use of the governmental operated railroads. The language of the act there in question read, that the President was authorized to requisition fuel if necessary, to the support of the Army or the maintenance of the Navy or any other public use connected with the common defense. May I stop there a minute to look back at our own Statute that we are here considering?

When Congress, by Section 12, said to the President: We give you the power to dispose of this enemy-owned property by sale or otherwise, and we give you the power to exercise any rights or powers which may be or become appurtenant thereto in like manner as though you were the absolute owner thereof—when

that power was given to the President to exercise in his discretion for the purposes disclosed by the records to which I referred this morning, for the purpose of rooting out these German industries, for the purpose of winning the war, enacted at a time when we were in the thick of the war, it is certainly parallel to the power given to the President here to seize coal necessary to the support of the Army or the maintenance of the Navy.

In that case the plaintiff failed to allege in its petition for reasonable compensation for the requisition of coal, that the coal was in fact taken because common defense, and therefore a demurrer was interposed to the complaint.

Your Honor overruled that demurrer and your Honor declared that the railroads were being operated as a war measure and as part of the common defense, and then your Honor added this significant language:

"It clearly appears from the petition that the executive branch of the Government had legal power and authority to take coal for a public use connected with the common defense and that the plaintiff's coal was taken for that purpose. Whether the taking was necessary was for the exclusive determination of the executive branch of the Government," said your Honor, "and its decision upon that matter is not subject to judicial review and consequently is not here in issue."

In this case Congress confined to the President the decision whether or not it was necessary to dispose of this property, and in what way, in the exercise of this war power and in the conduct of the war; and he was to decide it as the Commander-in-Chief of the Army and Navy. And we say that whether his decision that it was necessary to dispose of this property in the way that he directed it should be disposed of is,

in the language of your Honor, "for the exclusive determination of the Executive and a matter which is not subject to the review of the Courts."

One other very good decision on this point, your Honor, is found in the late case of Commercial Cable Company versus Burleson, reported in 255 Fed., at page 99. That also involved a question of the exercise of a war power, namely, the seizure by the Government of the Commercial Cable Company's marine cables.

In that case the President was acting under a joint resolution of Congress, which provided that the President could take possession of the cables during the war, "whenever he shall deem it necessary for the national security or defense." There again was the delegation of an authority to the President for him to determine when the national interests required the exercise of that authority; just as was provided in this case, that the President was not only to have all the powers of an absolute owner, but he had the power to decide whether in the public interest it was advisable to dispose of the property in one way or another.

In the case I am discussing the cables were seized five days after the Armistice was declared. In the Bill of Complaint, the plaintiff denied, in view of the Armistice, that there was any necessity for the seizure of the cables. The case came up for decision before Judge Learned Hand of the Southern District of New York, for whose opinions I know your Honor has the greatest respect. The Court dismissed the Bill upon the ground that it involved a non-justiciable question, and in its decision said:

> "Did Congress intend to bestow upon the President possession at his mere assertion that he wished it?"

He answers that question:

> "Without doubt. The language of the resolution is that he may seize the cables whenever he shall deem it necessary. His conclusion is the single condition."

The language here that we are concerned with says, not only that he shall have the powers of an absolute owner, but also that if he states the reasons therefor in the public interest, and so determines, the property shall be disposed of as he directs.

> "The occasion lent color to this interpretation," says Judge Hand. "The war was at its height, the nation was using every energy and resource towards its effective prosecution. The President as its executive head was responsible for its success, and the purpose of concentrating in him a power commensurate with that responsibility was obvious in all contemporary legislation."

Who shall say that the condition of this country in March, 1918, in the darkest days of war, were not such as to induce Congress to place into the hands of the President every weapon that it could lay its hand to with which to smite the enemy? If it were true that five days after the Armistice was declared the President's declaration that it was nevertheless necessary to take over the cables was beyond question by the Courts, who will say that a power granted to the President under the circumstances that I have detailed, if the President makes the determination, is nevertheless a question that the Courts can review?

Judge Hand says:

> "That Congress should have contemplated the possibility that he should be compelled"—meaning the President—"at the suit of an individual to disclose and justify the reasons for his act is be-

yond possibility. He had to act quickly, certainly, and without the counsels of Courts and private interests. Indeed, it would be a limited comprehension of the scope and variety of modern war which limited its activities to the immediate theatre of military operations. The espionage system of the enemy, we are told, was not limited to belligerents."

At least, it may be so, and if there is any proof in this case we shall present to your Honor it will be proof to substantiate the truth of that statement—that the espionage system of the enemy in this late war was not confined to the belligerents in the theatre of war.

"Provisions for supplies and material could not be made without an eye to the resulting scarcity at home and the available substitutes abroad. In a war which has called for the last resources of the belligerent powers, and where the United States was in active military co-operation with many of these belligerents, it is quite impossible to say that means of telegraphic communications anywhere in the world were not appropriate to its prosecution. If the President, who by virtue of his office was charged with the successful conduct of the war, decided that any such means were necessary, his decision was final. . . .

"Again, as in assistance to the conduct of war, if the cables be appropriate to a discharge of the President's constitutional duty, the number seized and the service rendered under governmental operation is not open to examination. The decision may be wrong; it may even be actuated by purposes other than those intended by Congress; but the relief is not from judges. The considerations which might dictate it are so obviously political in character as to preclude the possibility of their public disclosure or of their judicial determination. If possible, they are more foreign to the questions which courts may settle

than those determining the propriety of the seizure of an instrument of active warfare."

Now, I shall go no further your Honor, in a discussion of this question of law. My sole purpose is to bring it sharply to your Honor's attention.

In our argument upon our motion to dismiss the Complaint, we will, of course, argue all points involved. As I said, we will argue that motion today after the closing of my opening, or we will defer the argument, just as your Honor desires; but lest your Honor decide that you prefer to let the argument stand over until the evidence is all in, we thought it advisable to direct your attention to this basic question of law that lies at the root of this case; namely, that what is here involved is an application to a Court of Equity, to review the decision of the President, made by him in connection with the exercise of a discretionary power vested in him by Congress, by a war act passed in the heat of the war and carried out for the purpose of fighting the war.

With that statement I resume the consideration of the transaction here involved, and the next point that I desire to discuss is the question of the price paid for this property. We shall show your Honor that when it was determined to convey these patents to a corporation organized upon the lines that have been outlined and the industry represented by this American Dyes Institute was taken into conference and consultation, it was not a question of how much can be realized for these patents at public auction, because for the reasons that I have already discussed a sale of these patents at public auction was unthinkable. It was not practical. It could not be done. It was a physical impossibility. It probably would not have realized $10,000. It would not have realized enough to cover the expense of the sale; but the industry

said, as will be shown: We can raise only so much money. They said they could raise $500,000; and as Mr. Palmer pointed out in his report to the President, $250,000 of that sum was reserved for the purposes of the corporation, and the other $250,000 was paid in as a part consideration for the patents.

Now, of course, if this had been a transaction between two parties dealing at arms' length, the fact that the purchaser needed his money for some other purpose would have been immaterial to the question of price to have been paid; but we say to your Honor, and we shall always contend, that this corporation is not a mere outsider; that this corporation was conceived and was intended to be an agency of the Government; that it has acted in that capacity; that the Government has recognized it in that capacity; that when the Government wanted patents seized, they went to the Custodian and told him to seize them and give them to The Chemical Foundation, and then they took a license from The Chemical Foundation, and when parties deal in that way, the monetary consideration to our mind was the least important, and for the reasons that I have stated, the amount of $250,000 was agreed upon.

Now, Colonel Anderson said yesterday, and repeated it twice, that at the preliminary conference between representatives of the American Dyes Institute and representatives of the Alien Property Custodian, when they did not even know how many patents were to be seized, somebody said a thousand, and somebody said three thousand, that at that time the price of $250,000 was mentioned or determined upon, and I take it that he mentioned that and emphasized it as indicating that the parties really did not care how many patents they were getting or would get for this price.

Now I think Colonel Anderson is in error. I have

read, since I heard him speak, the stenographic report of the conference that he mentions and I find no mention of any $250,000 by anybody. There is discussion as to how many patents there were to be. It was said by some one man that it was a thousand, and by another that it might be three thousand; but Colonel Anderson will find upon reading the record, that he was in error when he said that the price of $250,000 was at that time either discussed or determined upon.

But I say that aside from that, from our point of view, the monetary consideration here was the least important of the considerations. It was the public use to which these patents were to be put. That was the real consideration that passed to the Government; but if we consider, your Honor, the elements that enter into the consideration, even if we look at this transaction as between two parties dealing at arms' length, I say, and I repeat, that the price of $271,850 that was paid for these patents was the full price, and the full value of these patents, notwithstanding Dr. Karl Holdermann, who said that some of them were worth $17,000,000. And may I say here in passing, when I talk of Dr. Karl Holdermann, that his estimate of the value of these Haber process patents, not only that it was based, as your Honor will recall, upon German, not American conditions, but that in the almost three years—no, the three and a half years that the Chemical Foundation has owned those patents, its sole return thereon has been the munificent sum of $900. Patents worth $17,000,000, says this man—and if you are to judge the value of a thing by its return,—you have had our books, and you have seen how much we have been able to realize on licenses under those patents.

But I am not going into a specific discussion of these patents your Honor. As the testimony comes in and is developed, your Honor and all of us, when we are through here, I hope will know more about chemis-

try than we know now; but the fact is that when these people, when the Chemical Foundation was considering what should be paid for these patents, here are the elements that have to be taken into consideration: First, that the company was obligated to issue non-exclusive licenses. Now, what is a patent worth that does not give you a monopoly? A patent in its very nature is supposed to be a monopoly; and Colonel Anderson argued yesterday in support of that policy of the Government, which gives to a patentee a monopoly; when we took these patents, we took them with the obligation to issue non-exclusive licenses to any American whether he was a stockholder or no. Where then is the value of the monopoly if we are compelled to let anybody work under the patent, where is the value of the monopoly? When you buy a patent—and we shall show this from the mouths of witnesses who know, the valuable thing that you get is not the text of the patent. That you can get from the Patent Office without paying any more than the fee for transcribing it.

What you get with the patent is what they call the "know-how," the practical way of putting the patent into operation. When The Chemical Foundation took these patents they did not get the know-how; the Germans had it locked in their breasts and would not give it up. When we took these patents we took them subject to licenses that had been issued by the Federal Trade Commission. We shall show your Honor that as to the important patents covering salvarsan there were five licenses outstanding. We could not interfere with those licenses. Under the law the Federal Trade Commission had a right to issue them and the licensees had a right to operate under them, and we had to take the patents subject to those licenses. The Federal Trade Commission had issued licenses upon many of

the important dye patents likewise, and we had to take the patents subject to those licenses.

When you buy a patent ordinarily, you get what you would get when you buy a piece of real estate, a warranty deed, practically—a warranty that the patent is good, valid. We got no such warranty deed from the Government; we took the patents for what they were worth.

When we took these patents we took them for an industry that was not well prepared to operate under them except by the building of plant, by the prosecuting of research and exploration. That we shall show your Honor entailed the expenditure of almost untold millions of dollars; and when you come to consider the value of a patent you must consider the market that you have for the patent. I grant that these patents were very valuable to the Germans. Indeed they were. Using them as they had been using them, exercising a monopoly as they had been, of course, they were very valuable to them. But when you look at the other side of the picture, with an undeveloped chemical industry, with no personnel, no chemists, no skilled men, nobody who knew anything about these patents, the patents not freely disclosing the information sufficient to use them, without the "know-how," the value of the patents was an entirely different consideration.

The result has shown that what was paid for these patents was all they were worth. Of the forty-two or forty-five hundred patents only about ten per cent of them have ever been applied for by anybody for licenses. Everybody knows, the Government I am sure will concede, that thousands of the patents that we took over were absolutely worthless. The result shows that of the forty-five hundred only ten per cent have been used and the balance are worthless.

They said yesterday just see what a fraudulent transaction this was; they paid $250,000 and there was

almost that amount of money—anyhow, I think Colonel Anderson said $250,000 in accrued royalties. It was, he said, as if you bought a business for $250,000 that had in its cash treasury $250,000 in money.

Now, if Colonel Anderson does not know, I am glad to inform him now: First, that the Chemical Foundation never received accrued royalties. Second, that it never wanted the accrued royalties; and third, that if there is any question about it, we have notified the Alien Property Custodian that we do not claim those accrued royalties.

I have before me here a copy of a letter written by The Chemical Foundation to Colonel Miller, the Alien Property Custodian, dated May 23, 1922, which was before this litigation was instituted, wherein we say as follows:

"Dear Sir: As you are no doubt aware, Section 10 of the Trading with the Enemy Act provides that suit to recover compensation for use and enjoyment under licenses granted by the Federal Trade Commission may be brought within one year after the end of the war, which date has been fixed as July 2, 1922. The Chemical Foundation, Inc., as owner of various properties under conveyances from the Alien Property Custodian is now preparing and will file before said date suits to recover such compensation from the licensees of said properties. After careful consideration of the provisions of the Trading with the Enemy Act the Foundation has determined to make claim only for such compensation as has accrued since the respective dates of the conveyances of such property by the Alien Property Custodian to the Foundation. It disclaims all rights to compensation under such licenses prior to such dates."

And two days thereafter, Colonel Miller acknowledged the receipt of this letter.

THE COURT: What is your desire, Mr. Kresel? I see it is now time for our usual adjournment. Is it your desire to conclude your argument this afternoon?

MR. KRESEL: I should like to conclude, your Honor, and I think I can do it, if your Honor will give me a half hour.

THE COURT: Is there any objection on the part of the plaintiff?

MR. ANDERSON: No, there is not.

THE COURT: You may proceed.

MR. KRESEL: Colonel Anderson also said yesterday that The Chemical Foundation had earned $1,300,000 on these patents. Well, Colonel Anderson is misinformed. His accountants have been over our books, and they know exactly what we have received. The total amount that has been received up to December 31, 1922, is $660,000. I am not giving the exact amount. It is a few hundred dollars more or a few hundred dollars less; and of that amount we shall show your Honor, when we come to put in the figures, that a large majority was realized not from manufacture in this country, but from the Germans, who imported under certain conditions some of the articles that are covered by these patents.

Now, I will pass over without much comment the argument of Colonel Anderson, that the Government being a trustee of this property, could not by giving a free license to somebody, thus depreciate the property, and he gave that very graphic illustration, of the trustee who held a piece of property and then dedicated it for the use of a park and then sold what was left.

Well, the difficulty with that illustration is that in this case even if we consider the Government to be a trustee in any other sense than an officer is a trustee, what was given away was given to the *cestui*

*que trust.* In other words, the free license that de preciated the value of these patents was a free license that was given to the Government.

And Colonel Anderson repeatedly stated in his argument that the President and the Alien Property Custodian were trustees for the Government of the United States.

I think I have already sufficiently covered the point that is made that Mr. Garvan acted in a dual capacity. If I have not, may I simply point out this one fact—that Mr. Polk's order is dated February 26, 1919; that Mr. Garvan did not become Alien Property Custodian until March 4, 1919; that Mr. Palmer's report is dated February 22, 1919, made public and was sent by the President to Congress on the 1st of March, 1919, when the transaction was spoken of as a completed fact, and that it was not until the 4th of March thereafter that Mr. Garvan became Alien Property Custodian. And all that Mr. Garvan did in this connection was to carry out a transaction that had been agreed upon, and carried out to a certain extent by the issuing of the executive order, carrying out a transaction that his predecessor had agreed upon, and the conditions for which had all been laid down and agreed upon.

They say Mr. Garvan is president. Yes, he is. They say Mr. Choate, who was connected with the Alien Property Custodian, is general counsel for The Chemical Foundation. He is. And so is Mr. Hoguet. And I say that it was the purpose of the Administration, the President, Mr. Polk, that this corporation should be officered by men who were connected with the Alien Property Custodian. That it was done purposely in order that it might be administered in the way that the Alien Property Custodian felt it should be administered, in order that it may be ad-

ministered upon the lines and conditions laid down in the original agreement.

And we shall show your Honor that what induced the President to appoint Mr. Garvan Alien Property Custodian was his connection with this transaction, and the purpose that the President had in mind was to see to it that this transaction was carried out in the spirit in which it was conceived.

Now, they criticize the form of the assignments of the patents. They point out that notwithstanding the provision in our by-laws and in our certificate of incorporation, that we were to issue non-exclusive licenses; that we were to give the Government a free license—notwithstanding all that, the first assignment drawn says that it is without any conditions and specifically that it was without any conditions laid down in our charter. And they point it out as an evidence that all this business about these other conditions were either afterthoughts or that no one intended to carry them out.

Your Honor is familiar with the doctrine of patent law that no holder of a patent can come into Court to prosecute any one upon a charge of infringement if he is not the whole owner and the absolute owner without conditions of the patent. Your Honor no doubt has had occasion to refer to the case of Mackenzie versus Waterman, which strictly lays down that doctrine that no one can be heard to prosecute an infringer who cannot show that his title is complete and that there are no outstanding rights in the patent to any one else.

We shall show your Honor that our reason for that stipulation in this particular assignment was that the Custodian was advised that if the conditions—namely, non-exclusive licenses, a free license to the United States and the other conditions that I mentioned there—were put into the assignment, there were

two dangers: First, that it might be claimed that there was some residue of interest in these patents remaining in the Government or the Alien Property Custodian; and, second, that if there were such a residue of title remaining, after the war it would go back to the Germans and we would be in a position where, whenever we sought to protect these patents, we would have to deal not only with the infringer, but with the Germans.

We shall show your Honor, of course, that notwithstanding that reservation, the conditions were complied with, as I have already shown, the license was given, that we have issued non-exclusive licenses; and, moreover, when Mr. Garvan came to make his confirmatory assignment pursuant to the ratification of the President, your Honor will find that in that assignment there is no statement that the transfer is made without any conditions and notwithstanding the provisions of our charter.

And so I say to your Honor that we have performed our trust, we have given the license to the Government, we have released the Government from any claims for infringement, we have issued non-exclusive licenses to every American, we have put the stock in a voting trust, we have devoted our income to education, we have served no selfish interests, we are carrying out our trust as laid down in our charter, our stockholders have received no monetary return upon their investment, and even the Government does not claim that this was a money-making scheme or arrangement.

But if we have not carried out our trust, if, as the Government claims, our charter is indefinite, if under it, were we so minded, we could avoid the trust, if the people who are now in control of the corporation should they be succeeded by others who are less public spirited, might turn it away from the lines

that have been laid out—we say here what we have repeatedly said before congressional committees, that we submit ourselves to the Court, that we will follow any suggestion or any judgment of this Court for the amendment of our charter, for making more absolute, positive and binding, if you please, the trust relationship that we have undertaken.

There is one thing we will not do: We will not give up these patents unless this Court says we must. Because we know that if we give them up they are going back to the Germans. The situation today, your Honor, is that the chemical industry is almost a self-sustaining industry. We are making about 90 per cent of the dyes required in this country. Indeed, a man whom I consider to be perhaps the best informed man on the subject, has said that if Germany never manufactured another pound of dyes and never sent another pound of dyes into this country, we would not miss it.

We have so far progressed here under the embargo which the Government granted, under the high protection which now exists, under the power to use these patents, that we are now practically independent of Germany. Where there were four or five assembling plants in 1914, I think the Tariff Commissions' Report shows there are now about 160 dye manufacturing concerns in the country.

But, your Honor, while we are free of the German domination of our industries, while Germany can no longer inflict upon our sick the misery that they were subjected to when Germany placed her embargo upon the importation of pharmaceuticals in this country, while our national safety is assured since we now have a self-sustaining dye industry which, just as the Germans did in 1914, can be turned into arsenals if, the Lord forbid, we should ever again go into a war—all this freedom from German domination, all this

independence of German monopoly, all this assurance and safety from German poison gas warfare, dearly bought as it has been, would vanish in an instant should the day ever come when Germany could re-establish her chemical industry and her control thereof in the United States.

That she will do, your Honor, just as certainly as the night follows the day, should she ever get these patents back. Give these patents back to Germany and she will again be in a position to dictate to our industries, to snatch the drug that heals from the lips of our sick, and to throttle us with her poison gases.

If your Honor please, it is not for us to question the motives of the Government in bringing this suit. We may assume that the Government is acting in the utmost good faith. But it is true, nevertheless, that if a decree in this case is entered in favor of the Government, the inevitable result will be that these patents will go back to the Germans. And I shall show your Honor why. Under our treaty with Germany, as Colonel Anderson pointed out, we are obliged to hold German property until Germany makes reparation for our claims and the claims of our citizens.

Colonel Anderson said that Germany has not complied with that condition, but he cannot have forgotten that there is today sitting in Washington the Mixed Commission that is considering claims against Germany, and that sooner or later Germany will supply the necessary funds with which to meet those claims. There is no Statute of Limitations under the treaty. There is no period of time within which Germany must do that. Certain it is that if we are to observe our treaty with Germany, if these patents are to be returned to the Government, the Government cannot sell them. They have to hold them until Germany satisfies our claims.

It is no longer possible to utilize the agency of

the Federal Trade Commission to issue licenses under these patents, because the power to issue licenses under the Trading with the Enemy Act is specifically given only during the war, and the war is at an end. The Alien Property Custodian has now neither the authority nor the facilities to issue any licenses under these patents. Congress alone can, by legislation, take this property and put it to any other uses than return it to the Germans.

The Germans know that if a decree ever passed in favor of the Government in this suit, and the Government got these patents back, that the Germans will have them. The Germans are watching this litigation with the keenest interest.

THE COURT: Mr. Kresel, I am wondering what the judiciary has to do with that matter. I do not want to interrupt you, but it seems to me a matter which we can probably clear up at the threshold of this case. Is not the question before me merely as to whether or not The Chemical Foundation is entitled to these patents under the orders and assignments which were made and which are recorded in the Bill and are exhibits to the bill and the answer, and not what disposition Congress or any other Department of the Government would make of these patents, should the decree of this Court be to set aside the assignments herein granted?

MR. KRESEL: I think your Honor is quite right, that the main question here is for your Honor to decide upon the basis of the transaction as originally made whether the Government is entitled to a decree. I am speaking of the effect of such a decree in its reflex relation, and in the light that it throws upon the purposes of the Administration when it entered into this transaction.

I am speaking of it as indicating, your Honor, why it was considered important by the President and

his advisers to do with this property what was done with it; and I am pointing out what may be the effect if this Court should undertake to undo the transaction. I was almost through with that end of it, your Honor.

THE COURT: Very well.

MR. KRESEL: But I am quite willing that your Honor should interrupt me.

THE COURT: I misunderstood your argument, and I rather thought it was indicating a principle or a thought that the Court should take into consideration in reaching a conclusion as to the wisdom——

MR. KRESEL: No, your Honor. I can not urge that upon the Court. I wish I could. I do not think that the Court's decision can be influenced one way or the other by a consideration of what the effect will be.

I had but one other thought, if your Honor please, that I wanted to suggest, and that was, that I am in agreement with Colonel Anderson in his admirable statement of the incompatibility of the theories regarding this case which are entertained by the Government and by the defendant.

I said earlier in my statement that I would read what Colonel Anderson said. I read from page 659 of the record. He says:

> "Your Honor will observe that there is therefore a distinct point of cleavage in the fundamental conceptions of this Act, which we will at the proper time argue, without direct reference to its specific terms and the production of authorities thereon, but those two theories are incompatible, for the obvious reason that if the Trustee is clothed with the usual obligation—common law or otherwise, whatever they are, on the Trustee, whether he be the President or any other officer, his high and first duty is to look to his trust estate and the benefit of the persons interested in that trust estate, as Congress may determine; that is, the question of the conduct of the military operations of the war or commercial operations, do not

concern him. They are for Congress. He is not the General Staff. He is not to determine what will win the war. He is not to consider the interests of American industry."

Now, I say that our conception of the question involved here would be admirably stated if in every one of these phrases where the word "not" occurs, you would strike out the word "not." I say that it was not the prime duty of the President during the war to consider how he can get the last dollar out of this property for the Germans; I say his highest duty was to find how to win the war. I say his highest duty was that of Commander-in-Chief of the Army and Navy. I say that when Congress gave him this power under the Act of March 28th, it was a power that was given him in order to win the war, not a power given to him in order to get the last dollar out of this property.

I say that upon that issue, so clearly drawn by Colonel Anderson in his admirable statement, we are ready to submit this case to your Honor.

I need not say that I am greatly indebted to your Honor for the patience that you have exhibited in listening to me these four or five hours, but your Honor can not overestimate the importance of this litigation that is now before you.

It is important to the Government. It is important to the defendant. We have deemed it necessary to outline at this length our views of this case, because we think it is of service to your Honor that you should have a clear conception of our contention, so that you may be able properly to weigh the evidence as it will come in here.

It is bound to be a long trial, and we want to assist your Honor in keeping your Honor's mind directed to the real considerations of this case; those

considerations that we have in mind, and that we are trying to urge upon your Honor as reasons why the Government acting in the best of motives, has not only mistaken its legal rights here, but I think has mistaken its public duty.

I thank you.

THE COURT: I have listened with a great deal of interest to the very able remarks of counsel on both sides, but there are one or two questions that I would like to ask counsel for both sides now if you do not mind answering them. I think probably they can be answered simply by yes or no.

The first is that, as I understand, the judicial power with respect to legislative acts is that that power is limited and restricted to the inquiry of whether the legislature, that is, Congress, had the power to act; and second, whether it has so acted. There the judicial power stops, as I understand it, in respect of legislative act.

MR. KRESEL: Quite so, your Honor.

MR. ANDERSON: I agree, except to determine its intent, I suppose that is included in the general——

MR. KRESEL: If the act is ambiguous, of course.

THE COURT: The construction of the legislative act.

MR. ANDERSON: Involves the general question whether it so enacted.

THE COURT: That is whether it has the power to act, whether it has acted, and, of course, the construction and meaning of what it has done.

MR. ANDERSON: Yes, sir.

THE COURT: I am wondering if counsel on either side contend that the judicial power with respect to executive acts or executive action is different from what it is with respect to legislative action.

MR. KRESEL: If your Honor means thereby

whether the Court has the right to set aside executive action—is that the Court's question?

THE COURT: The point is this, that is the point of inquiry, the point of judicial inquiry, as I understand it, stops, when it finds two things, or finds an absence of one or both of these two things, namely, as to whether Congress, under the constitutional power, had the power to do that which it had purported or undertaken to do; and second, if there is any question with respect to its Constitutional power, then our only inquiry is as to whether it has acted. For instance, I recall in this State, a question with regard to the signature of the President of the Senate, to a Bill, whether it was or was not signed, and then the question as to whether the legislative action had been consummated, or had been undertaken, and had not become complete; so that the judiciary can not go into the motives or intent or policy of the law, as I understand it. Now then, I am wondering whether the judicial power with respect to Executive acts is different, in the mind of either of the parties to this suit, or whether the judicial inquiry with respect to executive acts is identical with respect to legislative acts.

MR. GUTHRIE: I think the limit of judicial power is very much more restricted. The judicial power is very much more limited in reviewing executive acts, and especially acts by the President in his double capacity of the Executive and Commander-in-Chief of the Army and Navy. If the Statute clearly vests the power and authority in the President, the head executive officer of the Government, to do a particular act, it is beyond the judicial power to review that act. Of course, if the question is one of statutory construction as to whether the President had power to do it, that is within the judicial power; that is a matter of the construction of the Constitution or a Statute as to whether the officer, particularly the President, had the

power; but where, as in this case, as we contend, the power is vested in an officer, his discretion, whether right or wrong, in the exercise of that power, is not within the jurisdiction of the Courts. As Mr. Chief Justice White said in the Dakota case which your Honor cited in the Dexter and Carpenter case, the decision of the Executive may have been plainly wrong, but the Courts have no power to review it. The power was vested in the Executive to determine whether certain action should be taken.

MR. ANDERSON: Did your Honor wish to hear me in respect to Mr. Guthrie's statement?

THE COURT: I beg your pardon.

MR. ANDERSON: I do not agree with Mr. Guthrie's statement entirely. I agree with some of the general statement, but in its application to this case, of course, I do not agree with him, and I am a little afraid, while I am delighted to answer any question that your Honor would ask, that it would involve the opening of a somewhat extended discussion. I was somewhat puzzled in my own mind, whether, in view of the question being raised by counsel, and not being discussed by me yesterday, I should ask your Honor for permission to submit some views on that subject, before we went on with the evidence, to clear up our respective views.

THE COURT: Each side may answer that in the morning. If you have anything further to say, Mr. Kresel or Mr. Guthrie, in the morning, before hearing Colonel Anderson, I shall be glad to hear you.

MR. ANDERSON: Certainly.

THE COURT: I hope I have not misled you. I think, Mr. Guthrie, I did not make clear my mind——

MR. GUTHRIE: Evidently not, if your Honor will state your mind.

THE COURT: The purpose of my inquiry was to see if we could not eliminate that question from many difficulties which will continue to arise during the case.

I will ask this question so that it will be thoroughly understood, and the understanding with each party with respect thereto shall be thoroughly understood at the threshold of this case, and it is this: If I understand the constitutional law or rather the power of the judiciary, with respect to the acts of the Legislative Department of the Government, it is this, that the judiciary may inquire and determine as to whether in the performance of an act done by Congress, Congress acted within its constitutional field, or whether, in passing the particular Act in question, it has gone beyond its constitutional bounds. If the Judicial Department finds that Congress has gone beyond the judicial bounds, it ignores the acts and gives voice and effect to the Constitution. There is a second question which I thought possibly might be raised here in analogy with respect to the order. The second question is as to whether Congress has acted, that is, as to whether an Act has been passed, as to whether, for instance, you can conceive of it arising—as to whether the Act might not have required, in our State Legislature, for instance, for just a moment I asked about Congressional Acts—as to whether the Act did not require more than a majority, for instance, a two-thirds vote, then it would be a question as to whether Congress has acted. Now then, so far as I can see at the moment, no other question could arise with respect to Executive action.

MR. ANDERSON: Might I add one third point?

THE COURT: Yes.

MR. ANDERSON: As an inquiry to your Honor if this third point would not arise. Then assume that Congress had acted.

THE COURT: Yes.

MR. ANDERSON: Within the Constitutional power.

THE COURT: Yes.

MR. ANDERSON: The question then would arise what did Congress mean by that act?

THE COURT: Which is the construction of the act.

MR. ANDERSON: The construction of the act.

THE COURT: Then so you may have fully the application of my inquiry to this case, it is this: If those two things are the only points that the judiciary may consider when an executive act is questioned before it, then would come first the inquiry as to whether the President in this case, I take it, had the power to do what he purported to do or what he undertook to do, and second, if he had that power, did he do it?

MR. ANDERSON: Then would come, in the exercise of executive functions, a third question.

THE COURT: Yes.

MR. ANDERSON: Under the case of United States vs. Barlow, and that line of decisions, as to whether the President in the exercise of his discretion had before him a knowledge of the facts, or his representative in the exercise of discretion—correct knowledge, which would lead that discretion to do an act or to act upon a mistaken set of facts, which would always be ground for setting aside, which the Supreme Court held in United States vs. Barlow.

THE COURT: I am not familiar with that case. To get that answer or such other information as you may have is the purpose of my inquiry, because I am not familiar with that case, and I shall be very glad if you will help me further in that regard.

MR. ANDERSON: I will. Your Honor has been so patient with us——

THE COURT: You have been helping me.

MR. ANDERSON: But possibly we will save a great deal of time by taking up more time in discussion at the beginning. I was going to ask if I might tomorrow morning refer to a few points in Mr. Kresel's re-

marks which I had not anticipated, so you may get the issues between us perfectly clear on the facts and the law.

MR. GUTHRIE: May I ask Colonel Anderson to give us the reference to that case?

MR. ANDERSON: It is 132 United States.

MR. GUTHRIE: I take it that your Honor might like to look at it over night.

MR. ANDERSON: I should be glad if you would look at it. It is 132 United States.

THE COURT: What is the case?

MR. ANDERSON: It is United States against Barlow.

MR. GUTHRIE: And you say it held what?

MR. ANDERSON: It held that where the facts were not known to the Government Executive or agent exercising the discretion, that it was not in effect an exercise of that discretion, on the familiar principle that any act founded upon a mistake of fact, an essential fact, becomes not an act at all.

THE COURT: Would the same principle apply to the Act of Congress?

MR. ANDERSON: I do not know as to Congress, because I would not know whether it was possible to prove that Congress did not know it.

THE COURT: May I ask this one further inquiry. I am not sure if it is quite pertinent, except in dealing with the construction of the Act, but I am wondering, if you say that the President did not have the power to do what he undertook to do, and that not at all dealing now with these orders of Mr. Polk and the President, whether they were valid or not, but if the President did not have the power to do that which he did, or undertake to do, what power now exists, what power do you contend now exists in and by virtue of the Trading with the Enemy Act, to deal with these patents, or do you contend that Congress still exercises

legislative power, even though the war is ended, by now making provisions with respect to the patents, or by now amending the Trading with the Enemy Act, so as to permit a disposition of these patents, should they come back to you. I am not sure that I made myself clear.

MR. ANDERSON: I will undertake to answer that immediately to this extent, reserving of course offhand replies, which, like offhand arguments are very rough. Congress has power, if it should elect, to return this property at all, which it is under no obligation to do under the Treaties, if it should elect to do so at all has the power to impose any conditions upon its return that it sees fit, and therefore there is no limitation upon the power of Congress in that regard, and no one can enforce any limitation upon that power, so far as I know, in dealing with this particular property.

MR. GUTHRIE: In other words, it is well established that Congress, if it sees fit, can violate the Treaty.

MR. ANDERSON: Undoubtedly pass an act repealing the Treaty.

MR. GUTHRIE: As Mr. Kresel pointed out, as the law now stands, all that the Government could do would be to hold these patents ultimately or to return them.

MR. ANDERSON: I beg your pardon, but Mr. Kresel failed to point out that the Treaty provides with the exception of any property heretofore or afterwards disposed of in accordance with the law.

MR. GUTHRIE: This was not disposed of in accordance with the law, of course, you claim.

MR. ANDERSON: But it can be disposed of in accordance with the law.

THE COURT: To go back, I do not know whether I am taking you into a field which must be excluded or not. I have not determined that, and my only purpose

in asking, is to get your view of the construction of the Act, broadly speaking, and not what disposition or what Congress would do with these patents, that is forestalling it, and that is a matter for Congress and not for me.

MR. ANDERSON: Exactly.

THE COURT: As I understand you, the power to sell would still exist.

MR. ANDERSON: Offhand, I have not the Treaty or Statutes.

THE COURT: That would be determined, as I understand you, under the Treaty and the Trading with the Enemy Act.

MR. ANDERSON: It would be determined by Congress in its discretion, and Congress is not bound by the terms of that Treaty, if it wants to repeal it; but I assume that Congress would act in accordance with that Treaty, and I take it that that under that Treaty, and the Trading with the Enemy Act, and other provisions all together, Congress is free to deal with these patents as it sees fit. If your Honor will permit me to suggest, however, with all deference, I am perfectly willing to argue the power of Congress to deal with them. I do not think it is a question that the Court can consider as to whether the Government is entitled to recover them. The Government determines its own policy with regard to those things, after it is recovered or not recovered.

THE COURT: What I was trying to get clear in my own mind was your construction of the Trading with the Enemy Act. Probably my question was too broad. It was merely to see whether your position is that there is a present power under the Trading with the Enemy Act to make a sale.

MR. ANDERSON: I do not know that I could without going over the Act undertake to answer your Honor's question directly, but the present power in Con-

gress, the full legislative power of the United States, exists in Congress, and therefore if the Act does not give the power, Congress can pass such acts as it sees fit. I am not in a position without going through the Act——

THE COURT: Probably that question will not help, and it may delay us.

MR. ANDERSON: Possibly I do not quite catch your Honor's point. I will say this—that Congress from the beginning had undoubted power—I may have personally a little difference with this, but under the decisions of the Supreme Court of the United States, which I think we all abide by, it had undoubted power to confiscate this property if it wanted to do it at any stage in the proceeding.

THE COURT: I understood that from your argument.

MR. ANDERSON: Then the question of the power of Congress now will require a very careful study of these Treaties, but I have no doubt of the power of Congress to deal with the situation as it may require.

THE COURT: I wanted merely to get your view from that standpoint, of the construction——

MR. ANDERSON: If you will allow me to say this. Your Honor will recall that the Act expressly provides that any claim of any person to this property or the proceeds thereof after the war shall be disposed of as Congress shall direct.

THE COURT: I recall that provision.

MR. ANDERSON: So I think Congress has full power.

THE COURT: If I understand you, the broad difference between you is this, that you are contending that, conceding that there was a power of some sort, and I am not trying to confine you to the four corners of that field, just now, but conceding there was some power vested by the Trading with the Enemy Act, by

Congress, in the Executive, that power was so limited and restricted that he was required to make a sale of those patents, if a sale he did make, through himself or his agents, his subordinate officers, solely as if he were a Receiver, a Sheriff or a Marshal, that is, he would be acting as a ministerial officer in the exercise of that power, and in doing that his sole purpose would be in realizing for such interest as should ultimately establish his right, the greatest sum of money that it was possible to realize from those patents. Now then, if I understand you, Mr. Kresel, you deny that that is a proper aspect with which to view the Executive acts under the circumstances then existing?

MR. KRESEL: Under the Act.

THE COURT: Under the Act and under the circumstances then existing, and that the viewpoint with which this should be approached by the Chief Executive and his subordinate officers was what disposition would be for the best interests of the United States and the people thereof, and that if the monetary consideration for the patents was an element in such disposition it was not the sole element, not the main element, but under the circumstances then existing it was possibly a minor and subordinate element.

MR. KRESEL: I think your Honor has stated it admirably.

MR. ANDERSON: The first part of your statement, the part in which you undertake to state my position, is not quite as broad as I would make it. I would beg leave to amend also the second part.

THE COURT: I would be very glad to have you do so.

MR. ANDERSON: In the first place I take the view that under the Act the Alien Property Custodian was a Trustee and that he not only had the powers, full power of sale of a Trustee, which is given that power, but that he had also the obligations of a Trustee, and

that the President even, acting under that Act, allowing the largest possible leeway that a reasonable construction of that Act would give, was also bound by the intent and purpose of that Act to carry it out in accordance with that purpose, and therefore that he must make a fair sale of this property, which is a test of the Act of a trustee.

In a fair sale many considerations enter and there may be trusts of broader powers and trusts of narrower powers, and your illustration of the Marshal or the Sheriff is hardly a fair illustration of the broader powers under this Act.

THE COURT: I understand.

MR. ANDERSON: In the second place, while I do not undertake to state Mr. Kresel's position, the position taken in the answer is that the advancement of the industry, when you say the interests of the people of the United States, that becomes a very, very broad question of the most indefinite character. But that the controlling impulse here should be the advancement of the industry interested in these patents with an indirect benefit to the people of the United States. Therefore the answer in this case does not take as broad a position. Your Honor will see the difference as to what is to the interest of the people of the United States may be the most indefinite and far-reaching thing. But here the interest of a specific industry in the United States is asserted to be the controlling principle. With that amendment I accept your Honor's statement.

THE COURT: I am very much obliged to you for bringing that to my attention, and making that statement.

MR. KRESEL: As I understand it, Colonel Anderson would like tomorrow morning not only to answer the questions that your Honor has just put to us, but

also to answer some part of the statement that I have made in opening the case. Is it your Honor's desire that that should be done?

THE COURT: I think that was restricted to questions of law, was it not, Mr. Anderson?

MR. ANDERSON: Yes, except where there was some little error in the statement of my position which I would like to get correct. I think I am entitled to that. But it will take me a very few minutes, in any event.

THE COURT: Very well, I will let you do that. I think it is to the interest of both sides.

MR. KRESEL: I have no objection to their replying to me as long as your Honor gets the questions clearly drawn.

THE COURT: I have no objection either.

MR. KRESEL: Take all the time you want.

THE COURT: Each of you recognize you have gone far afield of the usual opening.

MR. KRESEL: This has been more than an opening.

THE COURT: I think you help me materially. I think you have disclosed to each other the positions which each of you occupy, so that the case may be now tried clearly on the merits.

MR. ANDERSON: I think so, and if I say anything more in the morning beyond answering your Honor's questions, it will be very brief and only to make my position quite clear on those points.

THE COURT: I will adjourn Court until tomorrow morning at 8.30 Standard time.

(Whereupon, at 3.45 P. M., an adjournment was taken until Wednesday, 6th of June, 1923, at 8.30 o'clock, Standard time.)

THIRD DAY

Wilmington, Delaware,
June 6th, 1923, at 8.30 o'clock A. M.

*Before:*

HON. HUGH M. MORRIS, *U. S. District Judge.*

*Appearances:*

As before.

STATEMENT OF MR. GUTHRIE.

MR. GUTHRIE: If the Court please, I gathered from the questions put at the close of the argument yesterday that the Court would like to discuss this morning the general philosophy of this question of judicial power and how far the Courts may go in reviewing the exercise of power by the legislative branch on the one hand and by reviewing the exercise of power by the executive branch of the National Government on the other hand, and the latter inquiry divides itself naturally into how far the Court may review the action of the President, the supreme executive officer of the nation, and the action of ordinary heads of departments.

The power to review the action of the legislative department, a co-ordinate branch of Government, is of course well limited, and the inquiry always is whether the legislature has acted within the power conferred upon it by the Constitution if we are dealing with Federal legislation, or has acted in conflict with constitutional limitations if we are dealing with State legislation.

It is solely a question of power. The expediency, the wisdom, the justice of the legislation is wholly beyond the sphere of the judicial power. A court can determine only whether the supreme law of the land,

which is above the legislature, did or did not authorize the particular enactment which is before it.

Very analogous to that limitation of power upon the Courts in dealing with the acts of the legislative power is the limitation when the Courts are called upon to deal with the acts of the President of the United States in time of peace, and, likewise, but more strictly still, in time of war.

Your Honor will recall—you probably had in mind yesterday when you referred to the power to investigate whether an act had been passed in conformity with certain procedure—the famous case of Field versus Clark, relating wholly to Federal legislation; and what I have just referred to as the philosophy of that question of jurisprudence was discussed by Mr. Justice Harlan.

The fundamental reasons why the Courts can not go behind the certificate of the constituted officer, the President or the legislative officers, as to the validity of a statute in respect of mere legislative procedure, is the impossibility of investigating such a question by judicial process and the calling of witnesses as to what did or did not occur in a legislative body. That is closed to the judiciary, and whether you call the certificate or the signature of the President or legislative officer conclusive or you say, in the more modern term, that the question is not justiciable, it is beyond the power of the Courts as a co-ordinate branch of our national government to go behind such a certificate.

Similarly, with respect to any exercise of discretionary power by the President of the United States, the Courts can not investigate his reasons or subpoena the President and compel him to state the reasons which actuated him, or place him upon the stand to be examined and cross-examined, as to what he knew or believed, or what had been disclosed to him, perhaps State secrets, with the power of a Court to believe or

discredit the President of the United States as it saw fit and substitute its judgment or discretion for the judgment or discretion of the President. It is as it seems to us, against public policy, as it would be highly unseemly, that the propriety of the exercise of discretion by the Chief Executive of the Nation should be subjected in time of peace to the supervision of or control by the Courts. And if that be true in time of peace, is it not even more true in time of war?

Let us for a moment reflect what the result would be if the exercise of the great powers of the President under war Statutes vesting power in him, not only as Executive but as Commander-in-Chief, charged with the duty of waging war, charged with the duty of the common defense, a duty not imposed upon Congress, a duty not imposed or shared with the judiciary, a duty and responsibility imposed upon the President, the whole duty and the whole responsibility, if this exercise of discretion were subject to review by the Courts.

It would, we submit, be a highly improper thing, highly unseemly, highly prejudicial to the best interests of the country and its safety and defense, if a President of the United States in the exercise of the power so vested in him, frequently requiring prompt and immediate and emergent action, had to reflect that everything he did, that every exercise of discretion might have to be justified before some Judge or jury later and that every act that he took or determination that he arrived at in the common defense and in the waging of the war was subject to judicial review, upon the suggestion as contained in this bill, that the President did not know what he was doing, that he did not properly investigate what it was his duty to investigate, that he did not know this or that fact, and that he might have reached some wiser conclusion. And this high duty and power exercisable during the war

follows the war, especially during a period of the mere suspension of hostilities, with the possibility, if perhaps not probability, in his mind, that there might be a renewal of hostilities.

When the President of the United States went to Paris on December 4, 1918, he must have had in mind that if the terms of peace were not agreed to by the vanquished, there might necessarily have to be a resumption of hostilities. During all the period that you are reviewing, there was an Armistice, that is, a mere suspension of hostilities, and there was incumbent upon the President of the United States the duty to contemplate that there might be and possibly would be a renewal of hostilities with hundreds of thousands of our troops on the soil of France ready to renew those hostilities if he as our Commander-in-Chief gave the order. Therefore we must consider this action of the President as carefully and with as grave and anxious a concern as if a renewal of hostilities were likely or it had been taken when this Act of Congress was passed on March 28, 1918, and so many believed that the war would be lost, when the French Government was again preparing for the contingency of having to retire from Paris, and when the world stood in the face of the greatest calamity that has ever befallen humanity—a victory by the Germans.

Indeed, it was the duty of the President to contemplate the renewal of hostilities. As your Honor will recall, in the case of Stewart against Kahn, the Supreme Court said that the war power extended not only to the waging of war, during active hostilities, but to the prevention of the renewal of hostilities, and, what is further, the remedy of any evils which the war in its progress had developed and shown to exist.

It so happened that it was my duty to argue to the Supreme Court of the United States, that the Armistice constituted to a great extent the termination of

the war, and a restoration of the peace status, and that what might have been justified during the progress of the war, was not justified after the Armistice.

The Supreme Court of the United States, however, unanimously reasserted the doctrine of Stewart against Kahn, in 11 Wallace—I am now referring particularly to the case of Hamilton against the Kentucky Distilleries Company—that a state of war, for all purposes of judicial cognizance, still continued, and it follows that if a state of war still continued, it was the duty of the President, as the Chief Executive and as the Commander-in-Chief of the Army and Navy, to take all measures which he conceived to be wise, necessary and prudent to prevent the renewal of hostilities, and to remedy the evils which had arisen and the menace which had faced us during the progress of the war.

Now, we assert, with confidence, that the acts of the President of the United States are different from the acts of an ordinary head of a department, like the Postmaster General, or the Secretary of the Interior, or other head of department in whom power is vested, or to whom discretion is given by Statute. We say that, although in many cases the exercise of discretion and the exercise of power by such heads of departments may be justiciable, because they can be made to come before a Court and justify their acts, where they are charged to have been an abuse of power, or to have been arbitrary or fraudulent, in the case of the President of the United States, that can not be done, and that because one Administration happens to differ with a prior Administration as to the necessity or policy of a war measure, the successor Administration cannot bring the exercise of discretion or the war measures of the prior Administration before a Court of Justice for the Judges to substitute their judgment of the emergency and of the necessity,

and of the remedies necessary not only for the existing evil, but for the future in the Nation's defense, to the test of their individual judgment, varying as judicial minds vary.

Now on what do we base the absolute stand that we take; a stand which we say is necessary for the protection of the Nation, a stand which we say is necessary unless the decision of the Courts is going, perhaps, to paralyze the Executive and Commander-in-Chief of the Armies of the United States in the future conduct of war, unless hereafter in the conduct of a war which may involve the freedom and existence of the United States, the President, at his peril, must consider whether his acts will pass judgment before a Court of Justice, and whether the Courts will or will not approve them and review his exercise of a discretion vested in him by Statute? Those dealing with him would have to consider not the great office, and not the discretion and power, which of necessity should vest in that office—the office of Executive and Commander-in-Chief of the Army and Navy of the United States—but whether the particular facts and surrounding circumstances depending frequently on the fleeting memories of men, did or did not justify the act; and of course, if this can be done today, four years after this transaction took place, by a succeeding Administration, because there has been a change of power, we can conceive of its being done twenty years from now, upon the plea that the President of the United States did not wisely exercise this discretion or did not know what was best for the interests of the country at a critical period, and thereupon the Courts may substitute their judgment for his.

Now, as early as the days of Marshall and Story, that question came before the United States Supreme Court for decision; I mean the first branch of the question, as to the power of the President. It is true in

contemplation of possible hostilities, but at a time of peace, an Act of Congress had vested certain discretion in the President as to whether or not he should call out the militia, and it was asserted in litigation before the Courts that the facts existing at the time did not justify the action of the President, it was wholly fanciful and arbitrary, and that therefore it was illegal and beyond the authority conferred upon him.

Mr. Justice Story, writing the opinion of the Court and declaring with emphasis that he spoke the opinion of every one of those great Judges, pointed out that there were a great many reasons why the exercise of discretion by the President of the United States should not be the subject of investigation by the Courts, among others pointing out that there were secrets of State and that there were reasons which could not be properly or duly disclosed in the course of litigation, and that where Congress saw fit to vest in the President discretion in regard to any step to be taken, either in the common defense or in the waging of war, or indeed in any other conduct of the National Government, it meant a discretion to be exercised by him and not by the Courts, and when the discretion was exercised by him it was conclusive, wholly irrespective of the reasons which he might assign and, indeed, if he assigned no reasons at all.

Therefore, in this case, if there were no reasons before you, if there were not the full explanation contained in this exhaustive report of Mr. Palmer which was submitted to Congress and was given the broadest possible publicity; if there was no explanation to be found in this message which the President sent to the Congress of the United States—for he sent the Palmer report for the information of Congress, to advise it as to the reasons why he ratified and approved this transaction—if there were no reasons whatever, your Honor would have in our judgment to hold that

it must be presumed that the President of the United States had abundant and sufficient reasons, and that even if the reasons assigned by the President of the United States were in the judgment of the Court inadequate or insufficient, nevertheless, it must be presumed that there were other reasons which the President may not have seen fit to disclose and which governed him in reaching this most solemn of all duties in the performance of the highest trust which a free people can repose in its head Executive.

Now, if your Honor please, this very question of the power of the judiciary to grant relief, where the President is alleged to have acted arbitrarily or unnecessarily or precipitately or without due facts or without warrant in the surrounding circumstances, was argued before the Supreme Court of the United States in the Dakota Telephone case, and there is no escape from the reasoning of the Chief Justice. He did not say that the reasons or the explanations advanced on behalf of the Government by the Solicitor General at that time were sufficient or adequate, or that the circumstances surrounding the seizure of the telephone wires and prescribing of rates interstate were sufficient. The Court practically said that, conceding that they were not sufficient, their sufficiency was beyond the investigation of the judicial power.

I will ask your Honor's indulgence whilst I read this language of the lamented Chief Justice, speaking the opinion of the Court.

Mr. Chief Justice White says:

"The proposition that the President in exercising the power exceeded the authority given him is based upon two considerations: First, that there was nothing in the conditions at the time the power was exercised which justified the calling into play of the authority."

Just as here it is to be contended that there was

nothing in the circumstances that existed in February, 1919, to justify the disposition as made of these enemy-owned chemical patents which could be used so disastrously in waging war against us, or which could be used so advantageously by our people in the common defense.

The claim was that there was nothing in the circumstances justifying at that time the exercise of the power, the Court adding: "Indeed, the contention goes further and assails the motives which it is asserted induced the exercise of the power."

Apply that test to the arguments addressed to you on behalf of the Government. The motives of the President of the United States or his duly constituted representative are brought before you for review, for you to overrule if you happen to differ. The answer of the Court was: "But as the contention at best concerns not a want of power, but a mere excess of power or abuse of discretion in exerting a power given, it is clear that it involves considerations which are beyond the reach of judicial power. This must be since as this Court has often pointed out, the judicial may not invade the legislative or executive departments so as to correct alleged mistakes or wrongs arising from asserted abuse of discretion."

Yet your Honor is here asked to correct the alleged mistake and the alleged wrong of President Wilson as well as of his duly constituted delegate, the Assistant Secretary of State, Mr. Polk, alleged to arise from abuse of discretion, in the very teeth of the doctrine authoritatively laid down by the Supreme Court of the United States.

And then finally, in closing the opinion, as your Honor will readily recall, Chief Justice White said:

"In saying this, however, we must except suggestions as to want of wisdom or necessity for conferring the power given or as to precipitate or uncalled for

exertion of the powers as conferred" Exactly what is argued here. Mr. Chief Justice White added: "From all of which we have turned aside, because the right to consider them was wholly beyond the sphere of judicial power." And it is in our judgment impossible to distinguish the principle of what I prefer to call the philosophy, the political, the sound political philosophy of that decision, without recognizing the infinite danger that would result if any other course were permitted; if it be said that it might result in tyranny, if the President's discretion were not subject to review by the Court, that it will result in placing unrestrained power in the President of the United States, the answer is that our form of Government is the Presidential form of Government, that we elect a President for the very purpose of vesting in him certain unrestrained discretionary powers, and that his responsibility is not to the Courts but to the people; and if he abuses that power, if he abuses that discretion, wrongly, fraudulently or even corruptly, the remedy is not with the Courts; it is with impeachment in a glaring case, or with the people when the due time comes, for them to determine whether the man who has so abused his power shall or shall not be re-elected if presenting himself for re-election.

I take it that it was in this very Court that it was argued on behalf of the Government before you in the case of Dexter & Carpenter, Inc., against the United States, that the United States would not be liable under the Lever Act unless it was shown that the act of its officer was necessary and hence authorized; in other words that under the Act even as a measure of war necessity it was incumbent to show that the seizure of the coal was absolutely necessary. And your Honor, citing and relying on this Dakota case, brushed that plea to one side, and said substantially, "It is not for the judicial power, it is not for the courts, to pass

upon the question of the necessity of an Act by the Executive power. The Courts must conclusively assume that it was necessary and are bound by the Executive action."

The converse is presented here. If the Government advanced in that case the argument that the act of its representative was not authorized by the Statute because in fact the seizure of the coal was not necessary, and your Honor ruled that you would not permit any evidence or would not consider whether it was or was not necessary because you were not going to substitute your judgment, not for that of the President, not for that of the Fuel Administrator, but for the third instrumentality, the Director General of Railroads; if your Honor at the plea of the United States refused then to inquire whether the action of the Director General in that case was or was not necessary because it was beyond the judicial power to investigate, why is not the same principle and the same rule applicable here, when again the United States is claiming that its officer, the President of the United States, and the Alien Property Custodian acted improperly, acted without authority, acted without necessity, acted improvidently, did not get every dollar that they should have gotten, did not see that the documents were so drawn that there was no possible escape from the obligations which the Chemical Foundation was agreeing to assume? Why is not the precedent of that case on all fours with the question now presented to you?

Again, your Honor will recall the famous case of Commercial Cable Company against Burleson. There never was a bill of complaint which charged more serious or grave misconduct; not against the President, but the President's nominee, Mr. Burleson. It charged fraud, charged ulterior motives, charged oppression, charged that the act done was baseless and arbitrary,

that it had no authority in the facts and in the surrounding circumstances; that it was an abuse of power, an abuse of discretion, and that it was a case not within the intent or contemplated by Congress in the enactment then involved.

And in an admirable opinion by Judge Learned Hand it was declared that if there ever was a case which would justify investigation by a court of the propriety of the acts of the President or his deputy in the exercise of the war power, the allegations of that bill, conceded by the motion of the United States, presented such a case, provided such a case, in any aspect, however improper, however oppressive, however abusive of discretion the acts challenged might be, was within the power of the Courts—and he held that it was not within the power of the Courts.

I shall not take your Honor's time to read the opinion of Judge Hand, but it is most persuasive. It points out the great question of governmental philosophy involved here, and no one can read it, no one having due consideration for the future welfare and the national defense can read that opinion without the conviction that it is wise and necessary that this discretionary power, although capable of abuse, should be vested somewhere, and nowhere more properly than in the President of the United States or such officers as he might see fit to designate.

It is true that the Commercial Cable Company-Burleson case became moot while pending on appeal of the Commercial Cable Company in the Supreme Court of the United States, and was therefore, in accordance with the practice of the Court, in order to prevent *res adjudicata,* reversed without prejudice. But we stand upon the reasoning of that decision, which we are profoundly convinced is sound; and I may add, if your Honor please, that no counsel could argue such a question as this without being profoundly impressed with

the responsibility cast upon them—a case which, if it should go against our contention, would in our judgment immeasurably cripple the President of the United States, and in crippling the President, the Government of the people of the United States in the future, not only in the conduct of possible war, but in those measures which a President should take to prevent the renewal of war and provide for the common defense and welfare.

If tomorrow President Harding should deem it necessary under some proper Act of Congress vesting similar power in him as contained in the Trading with the Enemy Act to do exactly what was done here, because he thought the measure was necessary to provide for the common defense or general welfare, to prepare against the renewal of hostilities, to fortify the country against possible future attack, is it conceivable that the Courts would have power to sit in review upon his action, and that he would have to satisfy the Courts that the danger was real and existing, that he would have to satisfy them that there was a real danger to the country that required some such action in the national defense; that unless he could undertake or would be prepared to so satisfy Judges throughout the United States, he was to stand paralyzed with folded arms unable to take the necessary measures, although a Statute of Congress vested discretion in him. It would be little short of calamitous if this Court, or any Court, should hold that the action of the President of the United States during the recent war, of a great President, of a President who will live in history as the most efficient Executive in the greatest of all wars, of a President who inspired this country to an exaltation of patriotic fervor unequalled in the history of the world; that that President whose singleness of purpose no one has dared to question, is to have his motives investigated and criti-

cized and his knowledge and purposes investigated in a court of justice in a suit instituted by his successor, or instituted by some private individual.

It seems to us that the whole argument and criticism of the action of the President, advanced on behalf of the Government of the United States, is most unseemly.

Now, if your Honor please, you have undoubtedly noticed the peculiar and unlimited extent of the authority conferred by the Act of March 28th. I shall not argue further the question presented by Mr. Kresel, that it was the deliberate intention of Congress to adopt a new policy in March, 1918, at the darkest hour of the war, and when the necessity for effective measures was most urgent. I shall assume that your Honor will perceive that there was a fundamental change in policy, and that it was the intention of Congress to vest in the President, if need be, what would in practical effect be the power of confiscation, because no language could have been drawn that was more comprehensive in its scope than the language which was adopted.

Your Honor will remember that after striking out all provisions in regard to the limitation of power to sell in case of waste and leaving the language as it stood originally, that he might "make any disposition thereof by sale or otherwise and exercise any rights or power which may be or become appurtenant thereto, or to the ownership thereof." Congress went then further and added these far-reaching words—"in like manner as though he were the absolute owner thereof."

Your Honor has not failed to observe that the argument of the Government gives absolutely no force or effect to that language. The argument of the Government is based upon a construction of this Act, as if that language had not been inserted; as if there had

been no declaration by Congress, that the President should have, in respect of all property that he might seize, the fullest power which an owner of property could exercise, which meant, of course, if he saw fit to give the property away, if he saw fit to give these patents to the manufacturers of munitions or otherwise, it was clearly within the scope of that power, and he was to be untrammelled. He was to be authorized to do with the property, not as a trustee might deal with property, but as an absolute owner, to do with it as he saw fit. There can be no doubt that the members of Congress who voted for that amendment deliberately intended that the Great President of the United States, who was then waging the war, should be trusted with an unlimited power to do whatever he thought was necessary in the waging of the war, in the common defense, in preparing against the renewal of hostilities, and in protecting the interests of the country.

Now, if your Honor please, there has been some suggestion that the President did not act in this matter, and some challenge of the appointment of Mr. Polk. I shall rest with the presentation of Mr. Kresel, because it seems to us apparent that the President of the United States in appointing Mr. Polk, appointed a person who was then an officer of the United States, and not only an officer, but a constitutional officer; but if there were any question as to the authority of Mr. Polk—and I am going to argue this aspect now upon the assumption that there might be some question as to the authority of Mr. Polk and as to the action of the President—as to the necessity that the supervision and direction provided for in the Act of Congress shall be by the President himself before anything shall be done, on the theory that Congress in the language of the debate wanted the personal supervision and the personal direction of the President; not-

withstanding the express provision of the Statute that he may exercise any power or authority vested in him by such officers or officer as he might see fit to appoint.

Before anything was done, before this transaction was consummated, the President, on the 28th of February, two days after the Executive Order of Mr. Polk, sent Mr. Palmer's report to Congress with a letter reading as follows:

> "As required by Section 8 of the Trading with the Enemy Act, I transmit herewith for the information of Congress a detailed report by the Alien Property Custodian of all proceedings had by him under said Act during the calendar year 1918 and to the close of business on February 15th, 1919."

In that report there was set forth every reason which would justify the act of the President. Your Honor can not read that report without realizing how full and exhaustive the disclosure was.

Every aspect of this situation, every aspect of the importance of this chemical industry to the United States, not only in regard to dyes and chemicals of one kind and another, but in the common defense, in connection with the manufacture of explosives and of poison gases, every aspect of this question and every detail of the menace which existed to the welfare of the United States, from permitting these patents to remain in the ownership of the Germans, was set forth in the utmost detail.

Not only was the whole history of the industry and its menace to America, and the injury that the Germans had wrought by the control of these patents to America set forth, but every detail of the transaction, consideration, the grantee, the fact that Mr. Garvan was to be the first president of the concern, every feature which is now criticized, every material

feature which is now criticized, was disclosed in that report.

What is more, in that report reference is made to the Executive order of Mr. Polk, the Executive order that Mr. Polk had signed two days before, the Executive order which the President practically says to Congress "I ratify and adopt," because he sends the report to Congress with the reference to this Executive order, authorizing this very transaction which his delegate or appointee, Mr. Polk, had made; and under those circumstances we submit that it is little short of preposterous to criticize the fact that the order was made by Mr. Polk and that Mr. Polk was not acting President, when you find that before the signature is dry upon the paper, the President of the United States adopts it, practically approves it, sends Mr. Palmer's report to Congress, containing the statement that the transaction was authorized by an Executive order. Of course the Executive order referred to is the order of Mr. Polk dated two days before, February 26. In addition to that, even if the President had not by sending that report to Congress, ratified the action of Mr. Polk, he certainly ratified the action of Mr. Polk a year afterwards when in the omnibus ratification of February 13th, referring expressly to the two Executive orders made on his behalf, and presumably under his supervision and direction, by his nominee, the President of the United States practically ratifies the whole transaction.

We submit that under those circumstances the transaction is absolutely binding upon the Government and conclusive.

Now, there is another aspect to which your Honor referred, or at least we understand you to refer, and perhaps which we ought to discuss; although we think that it is not involved in this controversy and not germane to any issue presented, and that is: what is the rule applicable to heads of departments?

THE COURT: I did not inquire as to that. I would be very glad to have you discuss it, but I did not inquire as to that.

MR. GUTHRIE: You will remember that the learned counsel for the Government cited the case of United States against Barlow, in 132 United States, which involved the question whether in a case of fraud practiced upon the Postmaster General, the United States could sue for the recovery of money as upon one of the common counts; and therefore, assuming that we were not discussing here that this whole procedure had to be under the supervision and direction of the President, and that it was as matter of fact by public documents, of which you are bound to take judicial cognizance under the supervision and direction of the President and ratified by him in a message sent to Congress, assuming that we were considering simply the power of the Alien Property Custodian disassociated from any supervision or direction of the President, what would be the question presented?

You would then again come back to the fact that the broadest possible discretion and power had been vested in this head of department. He was not to act as trustee; under certain circumstances he was to act as any owner might act. He was authorized, of course, to act only in the common good; but he was also authorized, untrammelled by any limitation, to deal with this property as any individual owner might deal with it.

The discretion was vested in him to do this act just as plainly as if the act said, "And in his discretion to transfer these patents to The Chemical Foundation if he sees fit to do it," because any owner of property could do it.

Now, we assert that where absolute discretion, in the broadest conceivable language, is vested in the head of a department, in this unique and unparal-

lelledly broad language, that discretion is not subject to review by the Courts.

Of course, it is otherwise if the power of the head of a department is exceeded; but we submit that there is no excess of power here, because there is given the broadest possible power.

If there is proof of fraud by him, or practiced upon him—(and you heard the solemn withdrawal of charges of fraud, and the substitution of the euphemism of fraud in law)—if there is actual fraud, if there is a mutual mistake, if there is any fact that has been stated to you that would justify a finding that there was a mutual mistake (but everything that they did, and the purpose and the detail and the intent, and the fact, were all set forth)—if there was arbitrary action, that is, action without any rhyme or reason or without any justification; and here we insist was the fullest justification shown by this officer, that what he did was to protect the United States—unless those elements exist, the Courts have no power to interfere with the exercise of discretion.

There are two among many cases which have discussed this question, if your Honor please. The one is the case of Bates & Guild vs. Payne, in 194 U. S., which states the rule very appositely, as follows:

"The rule upon this subject may be summarized as follows—that where the decision of questions of fact is committed by Congress to the judgment and discretion of the head of a department, his decision thereon is conclusive; and that even upon mixed questions of law and fact, or of law alone, his action will carry with it a strong presumption of its correctness, and the courts will not ordinarily review it, although they may have the power, and will occasionally exercise the right of so doing."

And then in a late case, Leach vs. Carlile, in 258 U. S., the Court said:

"This was a question of fact which the statutes cited committed to the decision of the Postmaster General, and the applicable, settled rule of law is that the conclusion of a head of an executive department on such a question, when committed to him by law, will not be reviewed by the Courts where it is fairly arrived at and has substantial evidence to support it, so that it cannot justly be said to be palpably wrong and therefore arbitrary."

We submit that within that rule no facts have been either stated in the argument of counsel or alleged in the bill which would warrant a court in setting aside the conclusion arrived at by the Alien Property Custodian in the exercise of his discretion.

But we desire to repeat, and we cannot emphasize it too often, that in our judgment that is not the character of the question presented for your Honor's decision and that after all the testimony that you may take, after all the time that may be spent in investigating this question, you will come back to the real question involved, and that is not whether the acts of a head of a department in whom discretion is vested by an Act of Congress may be reviewed by the courts and to what extent, but whether the action of the President of the United States in the exercise of the war power of the Nation, or rather of war-power discretion duly vested in him by Act of Congress is subject to review by the courts, and whether the courts have the power or can with any judicial propriety investigate so as perhaps to determine whether or not they should substitute their judgment for the judgment of the Executive and Commander-in-Chief of the Army and Navy, upon whom the Constitution and Trading with the Enemy Act imposed the duty and the sole duty to deal with these questions.

THE COURT: May I make one or two inquiries be-

fore you begin, Colonel Anderson? Perhaps they may as well be addressed to Mr. Guthrie also.

MR. ANDERSON: I beg your pardon, I did not know your Honor wanted to discuss it now.

THE COURT: They are addressed to both of you. As I understand you, then, Mr. Guthrie, the issues that are decisive of this case are whether or not the Trading with the Enemy Act vested the President with power to dispose of these properties in the way that he did dispose of them—that, as I understand you, is the broad underlying question.

MR. GUTHRIE: Necessarily.

THE COURT: And that involves merely a construction of the Trading with the Enemy Act, and particularly the amendments of March—and November?

MR. GUTHRIE: I take it the criticism of the November 4th amendment has been abandoned. I do not gather from the argument of Colonel Anderson that he will suggest to your Honor that the theory advanced in the Bill has any foundation whatever.

THE COURT: Misrepresentation to Congress.

MR. GUTHRIE: Yes, I have not argued that, although, of course, we are prepared to argue it, because we think it would be a waste of time.

THE COURT: I do not care to hear you now, but may subsequently. Then the only other question that would be legally possible, the only other issue, as I understand you—I am not stating conclusions—I am only trying to get clear in my own mind and make sure that I have in my own mind the contentions of counsel—the only other issue, then, as I understand you, that will be legally possible, would be whether or not fraud had been practiced upon the President of the United States by this defendant? That is, I assume you are not denying that if actual fraud had been committed upon the United States, or upon the President or the Alien Property Custodian by the

defendant, then the United States, whether of the same or a different Administration, might, through a suit by the United States, have the transaction set aside on the ground of fraud?

MR. GUTHRIE: It is proper that we should state our contention, because even to the extent of asserting that the issue as to whether or not the President was defrauded presents almost insuperable difficulties for investigation in a Court of Justice, because it would require, as we readily can conceive, the calling of the President of the United States or an ex-President and his submission to cross-examination; but we are not here to advance or insist upon the proposition that if a fraud was clearly shown as having been practiced upon the President of the United States, the Government would be precluded from so showing and obtaining proper relief. We are ready to try any such issue, and if the Government says that this Bill means that a fraud, actual fraud, was practiced upon the President of the United States, by anybody for whom this defendant is responsible, of course we are prepared to meet that issue; but we call your Honor's attention to the fact that the allegations of the Bill and also the opening of Colonel Anderson, fail to show any fraud whatever.

Indeed, Colonel Anderson has spoken of almost everything under the sun, except actual fraud practiced upon the President or practiced upon Mr. Polk. What were the facts concealed from or misrepresented to the President of the United States in view of the Palmer report? What were the facts fraudulently concealed by Mr. Palmer from the President of the United States, or by The Chemical Foundation from Mr. Palmer? What were the frauds practiced upon and the misrepresentations made to Mr. Polk—or the material facts concealed from Mr. Polk by the Alien Property Custodian or by The Chemical Foundation?

We have yet to hear or to see any argument, or anything that would justify, as we submit, a court of justice undertaking for weeks to investigate a case where the Government cannot formulate any definite allegations of fraud.

THE COURT: Then, as I understand your contention, it is two-fold. First, as you said in your opening yesterday, Mr. Kresel, as I recall, that the ultimate determination of the issues of this case will depend upon, in large measure, if not entirely, upon the construction placed upon the Trading with the Enemy Act, and that construction being, as I assume, for the determination of the question as to whether or not the President had power to deal with these patents and otherwise, in the manner in which he did deal with them. Now, then, with your reservation, your second contention is that the only other issue available in a case of this character, and you think that it is not available—but the only other possible issue would be to determine whether the defendant did, in fact, practice fraud in order to secure the rights which it did get, that is the only other legal issue, as I understand your contention.

Now, your other contention is with respect to the orders delegating the power of the President to Mr. Polk, as I understand it, that those orders cannot be a nullity in the sense that they cannot be ratified, and that if they were almost a nullity, even the United States is not in a position, in view of the other acts done by the United States, to assert their nullity; that you contend, as I understand you, that the Bill itself, together with the exhibits and the Answer, is sufficient to show a purpose and intent on the part of the United States to vest the title of these patents in the defendant, and if there is a defect, as I understand your argument, it would be inequitable for a Court of Equity to set aside a transaction of this kind,

but rather it would be more in keeping with equity to perfect that title than otherwise, as I understand your contention, and that, if found defective, it would be more in keeping with the principles of equity, to correct any defect than it would be to defeat a transaction which it was the purpose of the United States to enter into through its duly authorized officers, assuming they were duly authorized to carry into effect. Is that your contention?

MR. GUTHRIE: Will your Honor permit me to add one suggestion?

THE COURT: Yes.

MR. GUTHRIE: In order that the thought will be complete in your mind.

THE COURT: I shall be glad to have it, because I am only trying to see from your standpoint whether I have your contention, because it will help during the trial of this case, if I have your several contentions, and I will get Colonel Anderson's in a moment.

MR. GUTHRIE: Assuming that the Polk executive orders were void, because as now argued by the Government, the President had no power, notwithstanding Section 5 of the Act to exercise this very important authority and power conferred upon him through an officer, I nevertheless say that the record shows that the Act of Congress was complied with, and it will take but one minute, in a few sentences, to state our contention.

THE COURT: I am glad to hear it.

MR. GUTHRIE: The Act of Congress says that the action of the Alien Property Custodian shall be taken under the supervision and direction of the President. Had there been no order on February 26th, no Executive order of February 26th, signed by Mr. Polk, and Mr. Palmer had in his report simply stated: I have conveyed these patents to The Chemical Foundation; and the President had then taken that report stating

that the Alien Property Custodian had so conveyed them, and sent that report to Congress, submitting it for the consideration of Congress as a *fait accompli*, we contend that the Government or the President could not be heard to contend that after all the transaction had been without the supervision and direction of the President; and again eliminating all reference to Mr. Polk's orders of February 26th and April 5th, as alleged nullities, we have the ratification of February 13, 1920. Certainly if President Wilson were now in court, he could not be heard to say: Why, this transaction was all done without my knowledge, supervision and direction, and I am not bound thereby.

THE COURT: That suggests another thing that I had in mind, and that is, is the legal effect of this case any different than what it would be if there had been no change of Administration? Is there any difference in the slightest degree in the issues of this case from what there would have been if there had been no change in the Administration?

MR. GUTHRIE: We are not contending anything of the kind. When we do suggest in argument, the change of Administration, we think it is a perfectly legitimate consideration for a Court to consider in analyzing the general nature of the judicial power it is asked to exercise; but President Wilson would practically be estopped, because the Government can be estopped; President Wilson would be estopped from claiming that this act was done without his supervision and direction when the record shows that he knew all about it and submitted it to Congress for its information.

THE COURT: And that estoppel would run against the United States.

MR. GUTHRIE: And that estoppel would run against the United States. If your Honor wants the authorities——

THE COURT: No, I do not want them.

MR. GUTHRIE: They are familiar. The same underlying principles of good faith and honest dealing which may create an estoppel against an individual principal apply to the action of the President, as well as to individuals. Of course, no individual under the present circumstances would be permitted to say that this act by his agent was done without his supervision and direction, when it appeared that he had taken a report which told the whole story and had sent it to Congress for its action and consideration.

THE COURT: And then, I think your contentions are reasonably clear, and Colonel Anderson may—

MR. KRESEL: Will your Honor permit me one more minute before Colonel Anderson starts?

THE COURT: I shall be glad to hear you, Mr. Kresel. I am sure you have no objection, Col. Anderson.

MR. ANDERSON: Not at all, sir, if you give me half the time that these gentlemen have had, I shall be satisfied.

THE COURT: You can have all the time you wish.

MR. KRESEL: I ask the liberty of asking your Honor to give me a few minutes, because your Honor, in the questions put to Mr. Guthrie, was careful to inquire as to our position with respect to the alleged invalidity of the orders made by Mr. Polk, in view of the argument on behalf of the Government that the delegation of authority from the President to Mr. Polk was invalid.

In that connection it seems to us to be proper to bring to your Honor's attention the fact that the two orders made by Mr. Polk which are involved in the transaction now before your Honor, are not the only two Executive orders applying to private sales of property by the Alien Property Custodian that were

made by Mr. Polk in the exercise of the authority conferred upon him by the President.

I think your Honor is entitled to know that in the exercise of that authority, based upon the same delegation that Mr. Polk acted upon when he made the two orders involved here, he signed scores of orders authorizing the Alien Property Custodian to sell at private sale property held by him, and that such sales so authorized were sales to be made not only to private individuals, but also to agencies of the Government itself, and that those orders involve the disposition of property running into the millions of dollars. And when I say millions of dollars I mean, not based upon any Holdermann estimate of the value of property.

For instance, your Honor, the entire wireless system owned by the Germans here at the outbreak of the war, which was taken over by the Alien Property Custodian and subsequently conveyed by him to the defendant, that conveyance was made pursuant to an Executive order signed by Mr. Polk. All the patents covering the superheater process which were taken over by the Railroad Administration, patents valued at untold millions we are told, patents that were involved in a litigation which the Government itself conducted only recently in another Federal Court, where the Government's contentions were sustained as to the title to those patents—those were sold to the Railroad Administration under an order made by Mr. Polk pursuant to the delegation to him by the Executive order of the President.

THE COURT: Were the orders challenged in that case?

MR. KRESEL: No, there was no question raised there. Of course, the Government did not raise the question there. There the Government was interested in sustaining the authority of Mr. Polk to make the

order which was at the base of that transfer. And, if your Honor please, when we come to putting in our case we shall present to your Honor these various orders signed by Mr. Polk. We think they are material. I say there are a number of them. I have not counted them, but they are all printed in a public document here. Here is one dated the 4th of December, 1918, the very next day after the delegation of authority to him by the President. This one covered, for instance, two thousand shares of the capital stock of the International Insurance Company valued at $576,500. Here is another one which involved the sale of certain rights of a German co-partnership, the Susquehanna—

THE COURT: You need not go into them.

MR. KRESEL: I won't go into the details of it, your Honor, but I thought it was very material that this should be brought to your Honor's attention, lest your Honor should have the idea that the two orders made here by Mr. Polk, which are challenged by the Government, were the only two orders made by him under that delegation of the President. I am sorry to have taken all this time.

THE COURT: I wonder, Colonel Anderson, if you would be good enough to help me out on this point while you are on your feet. I am not just clear if it has any bearing upon the issues of this case, and if it has not I will be very glad if you will tell me, so we can stop there. If it has any bearing on the issues of this case I shall be very glad to have your assistance in properly connecting it with the case, and if it has a bearing I shall be very glad if you will help me in determining the weight that ought to be given to that matter, if it should be considered at all. And, frankly, in the thought I have given to it, I have not tried to reach any conclusions, and I am not trying to reach any conclusions as I go along.

MR. ANDERSON: I understand, your Honor.

THE COURT: No question that I ask should indicate that I have drawn any conclusion, because I am not going to try and prejudge this case or any issue thereof. Mr. Kresel yesterday referred to a possible invisible power, and indicated, as I construed his argument, that that must be true, because the evidence which he would present and which was referred to in the pleadings in this case or indicated in the pleadings in this case, would show that the possible preservation of this country and possibly the independence of this country was dependent upon this country being able to build up a chemical industry—not so much for commercial purposes, possibly, but for the National defense; that consequently these patents could not be turned back under any circumstances to Germany; that therefore it was merely a question of compensation or the amount of compensation that Germany should receive in the adjustment of the financial affairs between the two governments, for these patents.

I am not just sure whether that argument is a matter for consideration in this case or not. I am not deciding that now. But if he is right that far, and the policy of the Government has not changed with respect to the turning back of the patents, then is the United States estopped from making such adjustment, financial adjustment, with the German Government, from making such adjustment as the Government sees fit, without regard to the consideration, the financial consideration, which was received by the Government for these patents? That is, isn't that a question which is not here involved? Isn't that a Governmental, International question, and not a question here involved in any way?

I am asking for your views on this. I remember your arguments in this respect, which I listened to with much interest, and I may say as to both of you,

Mr. Kresel and yourself, that I have not listened to abler arguments than those made by Mr. Kresel, by yourself and Mr. Guthrie.

MR. ANDERSON: Your Honor is very kind.

THE COURT: If that is not involved, then there is no question but that this Government may be in a position to adjust it; that is, if this was not a proper consideration, then the Government is not estopped from paying what consideration it deems proper. So that, even if the question of policy were reviewable at all, and I assume you will say that it is not, it was a part of the exercise of power or the existence of power given by the Alien Enemy Act, and the only question then would be as to whether the Government got enough dollars for the patents, I take it.

I have stated that roughly and crudely, and if I have not made my difficulties clear I will be very glad to elaborate on them.

MR. ANDERSON: I quite understand your Honor's position. Your Honor has asked a question which I had at the head of memorandum of notes or points which I was to touch upon this morning. Therefore, if your Honor will permit me to answer you in the order that I have in view, if I do not fully answer it, it does not disturb me in the slightest to be interrupted.

I wish to say in that connection, if your Honor please, that your Honor has been most kind in referring to the statements, or arguments, more properly, of myself and counsel for the defendant, and I hope that your Honor will permit me to express what I know they feel and my associates feel—that at no time in our experience have we appeared before a Court that has shown such consideration and allowed perhaps such latitude.

I really feel, however, even with the long time consumed, that time is being saved; because these

questions will have to be argued during the presentation of the case, in the admission of evidence and its relations and therefore the argument and re-argument during the trial would probably take up more time than the clarification of those questions at this time. That is my opinion.

I also want to join with your Honor in expressing my appreciation of one of the most interesting statements I ever heard, made yesterday, as well as one of the ablest, and my gratification that the presentation of this case thus far—and I hope it will continue—has been upon a plane of professional relationship that is most delightful.

There were certain statements made by counsel which probably are unavoidable in the discussion of matters of this kind, which possibly as a member of the Bar, representing the Government, as well as in my humble capacity here in this particular case it is appropriate that I should mention, to the end that there may be no misunderstanding. The first comes up with respect to your Honor's first question. That is with respect to the so-called invisible plaintiff.

I am sure counsel did not intend it, but that language taken in its natural meaning would be a decided reflection upon the President of the United States and upon the Government; because nothing is more to be condemned than for any one to come into court claiming a right without disclosing the interest in which that right is claimed, and certainly for the Government of the United States to take a position before its own courts and assert what it claims to be its own rights, while surreptitiously asserting it upon an invisible power, would be an unthinkable thing.

The statement, therefore, makes it necessary in my opinion for me to bring to your Honor's attention before it is introduced in evidence the communication upon which this proceeding is based. It is from the

President of the United States. And let me say in that connection, before I read that letter, that I was most gratified to hear your Honor suggest what to me seems obvious—that there is but one Government of the United States, and it is a continuing organization; for it is a Government of law, and law continues throughout the whole period of its existence. The change of persons is nothing. Who may today occupy the office of President and who may occupy it tomorrow is a matter of no consideration, and once that consideration enters the judicial department of the Government, we shall at once have a Government of men and not of laws.

Therefore, I yield to none in my respect for the former President of the United States as well as the present President of the United States—personally and as officers—and all others who have gone before them, with their splendid qualities, and their human imperfections. But when we come into the courts we forget their names, and even more do we forget their politics, and my reference and only reference to the question of a change in administration was in relation to the charge in the answer that there had been undue delay.

We cannot overlook the fact that the Government is administered through agents and persons, and naturally persons—it matters not who they are—taking one view, will not assert an opposite view, and therefore that is a legitimate reference. But the fact that there has been a change of the political character of the Administration is a matter which, to use Mr. Guthrie's own language, seems to me unseemly to mention in a court. For myself I may say in the capacity in which I speak, that when I come into this court I come as an officer of the court charged with the same responsibilities as your Honor is charged with—and I would not think of political considerations any more

than your Honor would think of them, and that I would not even suggest.

Therefore, the change of personnel has nothing to do with this case. It is a continuing office, the office of President, and that office should be treated with the greatest possible respect, as should the men occupying or who have occupied that office. But at last it is but an office created for the exercise of the sovereignty of the United States, vested in the people of the United States, and the acts of any occupant thereof are subject to review with deference and with respect, and with every possible presumption of fairness and consideration, in those tribunals which are established by the Constitution for such review.

With that statement I wish to read the letter of the President directing this litigation, and that answers your Honor's question. It is addressed to Colonel Miller, he being the Alien Property Custodian:

"Washington, July 1, 1922.

My Dear Colonel Miller:

My attention has been called by the Department of Justice to the fact that a corporation known as the Chemical Foundation has brought suit against the Treasurer of the United States and certain licensees of the Federal Trade Commission for an accounting alleged to be due the said Chemical Foundation on royalties due it for the use of certain patents originally seized under the authority of the Alien Property Custodian and sold to the Chemical Foundation by the custodian during the previous administration. On the face of such an action it became so apparent to me that an inquiry should be made, that I asked for a report by the Department of Justice on the sale of this enemy property to the Chemical Foundation. It appears that the sale was made at so nearly a nominal sum that there is reason to believe that this Government has not faithfully observed the trust which was implied in the seizure of this property. The circumstances relating

to the entire transaction are of such a character that full investigation becomes a public duty. Moreover, I feel that your office is obliged to maintain the sacred character of the trust to which the Alien Property Custodian is committed by the law.

You are, therefore, directed to forthwith proceed as follows:

1. Make written demand upon the Chemical Foundation (Inc.), in form to be approved by the Attorney General, to immediately return, transfer, and assign to the Alien Property Custodian all patents, trademarks, copyrights, contracts, applications, or other properties or rights transferred to it by the Alien Property Custodian as aforesaid, and to account to you for any and all rents, profits, license fees, or other proceeds thereof realized by said Chemical Foundation (Inc.) from said properties or rights, or any of them, from the date of transfer thereof to the Chemical Foundation (Inc.), to the date of restitution.

2. Take any other action which may be advised or approved by the Attorney General, by suit or otherwise, to fully and in every respect protect the rights or interests of the United States and any other person or corporation interested therein, in and to the properties and rights aforesaid, and any proceeds, income, or profits therefrom in the hands of the Chemical Foundation (Inc.), or its officers, agents, or employees.

In carrying out these instructions you will act under the advice of the Attorney General.

Very truly yours,

(Signed) WARREN G. HARDING."

I think, if your Honor please, that it would be a work of supererogation and probably not in the best of taste for me to go behind that letter and even discuss the purposes or motives which actuated the President.

This morning I am not going to argue the questions on issues of fact but merely state our position.

The next point to which I refer is to the argument of very able counsel who spoke yesterday, and this to some extent relates to your Honor's inquiry. That argument, the first half of it, was an indictment of the Germans. If I had been sitting on a jury trying the Germans for offenses against the United States I should have found a verdict for the plaintiff. But we are not engaged in that trial. Those questions and the wrongs done have been tried in a higher Court—that is, in the International Court of War.

The people of the United States have expressed their opinion as to the acts of the Germans in that regard, and others even more offensive might have been added, and in order to correct the wrongs done, if possible, and prevent their continuance, have spent the lives of thousands of their soldiers and billions of their money to win a great war.

Therefore, these questions are no longer open for debate. I yield to no one in my condemnation of those acts. A large part of the remainder of counsel's able presentation was addressed to the unwisdom of the monopoly in these particular patents, and especially a monopoly in foreign hands. Congress by Act has provided for the monopoly of the owner of patents and for the granting of patents even to foreigners. If the argument of counsel had been addressed to Congress and I had been a member of that body I should have voted upon that statement for an amendment of the Patent Law. But this is not the place for the consideration of whether that is wise legislation or unwise legislation, or whether the policy which Congress has followed and which brought about some of the conditions which he has described is a wise policy or an unwise policy. It is the law, and the Court sits to administer the law as it is.

If your Honor please, when that evidence is produced and when it is tendered we shall except to it as

utterly immaterial. If your Honor should wish to permit the evidence to go in, of course we shall yield; but we are not going to argue that question any further. We regard the whole discussion of the German relationship and the entire discussion of the wisdom or unwisdom of patent legislation and the conditions which resulted therefrom as outside of this case in every respect and outside of the province of this court.

Therefore we are brought down to this situation: Eliminating all of that which I think must be eliminated, conceding if need be that all that is said is true—of course, if it were pleading I should demur to it without the slightest hesitation and go up on the law—we are brought down to what was the purpose of Congress under this Act, what was the intent of Congress in enacting this Act, and whether that intent has or has not been carried out.

It is true that in arriving at that intent it is sometimes interesting and sometimes helpful for the courts to have before them the historical events leading up to the enactment of the legislation provided the legislation itself is not clear, to the end that the purpose of the legislative body may be fully carried into effect in the light of the surrounding facts and circumstances. But as that is only a rule of construction, we look first to the Act, and if the Act is not clear, we only then turn to the historical events and even to the debates of Congress in a most limited way to aid in arriving at that intent.

Therefore the statements, the very interesting statements of such great men as Senator Underwood and others—and I might refer in that connection to one of the very best reports made on these acts by former Governor Montague of Virginia, when he presented it to the House—all of those things may be interesting if we arrive at the point where it is necessary to consider extraneous matters in order to ascer-

tain the meaning of the language used in the Act. But first we must arrive at that point, and the question is, What is the Act?

I shall concede for the sake of the argument—though I wish to say here, parenthetically, perhaps, that if I have been understood to abandon any positions in this case, I wish to remove that impression at once. In the presentation of this case I followed what I conceived to be—let me use the word a decent course—to underestimate if possible the position of the Government, and if possible to avoid the slightest reference to any person which might in any sense be offensive. Sometimes it is necessary in courts for us to use unpleasant terms, but it should never be done unless it is necessary.

Therefore, if the purposes of the Government can be accomplished without aspersing the motives of anyone, I should very much prefer that it be done, and that is what I meant when I said I hoped not actual fraud. It should not be necessary. But the Government's case here is stated in the Bill, and I have not intended, if anything was so construed, to abandon any position taken in that Bill, and shall not do so in this case. We rest upon the bill, and we will try the case upon the pleadings. The oral statements of counsel often made in the hurry, and roughly, should not be understood as modifying the pleadings unless it is clearly stated upon the record to that effect.

I am perfectly willing to concede for the sake of the argument here that there was an enlargement, it may be, of the policy of Congress by the Act of March 28, 1918. I say enlargement because it was not a change of the fundamental purpose of Congress. Judge Hand in one of his decisions under the Alien Property Custodian Act said that the Act of March 28, 1918, if it did not enlarge, clarified or made more definite the power of sale. Possibly that is a very

good way to express it. I think it enlarged the power of sale, frankness compels me to say, because the limitation originally imposed upon the power of sale was to prevent waste.

But here I think the power of sale was given as to a trustee in a will, who is given the power to sell at discretion and reinvest. I think the power of sale was given very fully. And I am prepared to concede for the sake of this argument and for the present discussion, to make our positions clear, that Congress intended to authorize the divesting of an active German interest in American property—that is, factories and things of that kind—during the period of the war.

In other words, the obligation of the Government was to take under international law, (which the Supreme Court once said must be assumed to have been adopted in its most modern and improved state), that under international law the obligations of the Government, although it had power to vary that, was simply to take possession of, if it desired to, seize this property, sequestrate it during the period of the war, to prevent it being used adversely to the Government, and to conserve it during the period of conflict. Its primary purpose was to do that, but if it appeared to the Government that owing to the war itself, the earning capacity of these properties was enormously increased at the expense of the people of the United States, its obligation would be fully met by selling that property to American citizens at a fair value, and transferring the rights of the enemy-owner to the proceeds, because the Government's obligation was limited to returning the property which it took, or its equivalent, assuming that obligation to exist.

Therefore, there was no obligation on the Government to let this property go on and pile up enormous earnings during the period of the war. It might

have been a generous thing, but it was not an obligation of International Law.

Its obligation was to return the property or its equivalent that it received, and if therefore in its discretion it deemed it wise to transfer the ownership of an important factory to Americans that to the end such a factory might perform its service during the war, without increasing the property which had been taken from the alien enemy, it would be entirely legitimate that it should do so, and entirely just to the alien enemy.

That would be an entirely different thing, however, from the confiscation of the property. That would be accomplished by the sale of the property, just as the foreclosure of a railroad by this Court would transfer the property into private ownership and operation free from the restrictions of a receivership, so that it could perform its functions and be developed, in the meantime substituting in the registry of this Court, the proceeds of that property, upon which the rights of any creditors might be determined in this Court. That is done in every foreclosure sale in the United States Court, where the sale is made in advance of ascertainment of liens.

Now that was all that the Act of March 28, 1918 intended. Taken in connection with the other provisions of the Act which were continued in full force it can be given no other reasonable construction; and as I shall point out to your Honor, I shall not stop to do it now, that in every decision in which this question has been considered—there is not a single one to the contrary that I can find, and there are a number of them—where the question of the meaning and intent of this Act has been under consideration, it has been expressly held that it was not an act of confiscation, but was purely and simply an act of sequestration, with a power to sell and that Congress had not determined

upon the policy of confiscation, either under the original act or the amendments.

Now, therefore, I am perfectly willing, to concede for the sake of this argument, that the policy—the generous policy—adopted at the beginning of the war, was slightly modified—was modified and enlarged to the extent which I have indicated, for economic reasons, or other reasons satisfactory to the legislative mind, which reasons are not subject to review. The only thing is what did they mean to do I will come to what the Act meant presently, so that on that issue, if it be an issue, we do not disagree, perhaps, as to the purpose, but we disagree as to the extent to which that purpose was carried out. Counsel on the other side contend that it was an act of confiscation, we contend that it was an act of sequestration, with a full power of sale.

That brings me to the consideration in the broader aspect, of the inquiry of your Honor of last evening, and of Mr. Guthrie's very eloquent and able presentation this morning. I conceive that that question involves one of the most serious questions that any Court can be called upon to consider. I agree with Mr. Guthrie that it was one of a delicacy which can not be lost sight of at any stage, involving as it does, the delicate functions of the Government, which should be approached with the greatest care, and handled throughout with the greatest care, and consideration of every possible meaning and effect of the structure of our law. I want to notice here the suggestion indicated by counsel on the other side yesterday, and by Mr. Guthrie this morning, that anything that I said was an assault upon the President or of the Presidential Office. I think your Honor will bear me out that it was not justly capable of any such construction, because I guarded my remarks with the greatest care, not only from an appreciation of my duty as a member

of the Bar, addressing a Court of the United States, but as a matter of personal propriety if I may say it that way.

If anything I have said has been construed as a criticism of the President of the United States former or present, I want to correct that impression at once. I do not indulge in that kind of criticism in the Courts.

I recall, if I may, that while I was in Europe, especially in 1919 when the war feeling ran very high, I frequently had people approach me and start to criticize the policy of the President, and I had a fixed answer, that there was but one flag in the United States, and the President of the United States spoke for that, and when he spoke for it, within the limits of the law, he spoke for every citizen of the United States. That is my position now.

Therefore, when we deal with that great office, while it is an office of limited power, we deal with it with the deference and with the recognition of the fact, that not only is it the greatest office in the world in our view, and certainly of America, but that any man chosen to that office by the people of the United States, is entitled to every possible consideration and respect. We may differ sometimes legitimately, but as to those differences, the Courts are not the place to discuss them.

Now let us in that spirit and with those reservations approach this subject as lawyers, and as a Court, without criticism and without any attack upon anybody's motives. The power to confiscate property rests only in Congress. Mr. Guthrie and Mr. Kresel yesterday stated that they took the position that this Act gave to the President of the United States the power to confiscate property, or to give it away, if he desired. On that question we take direct issue. In the first place the President of the United States has no power to give away property. He can not do it under

the Great Seal of the United States. He can not do that. No matter how high his motives he can not give away the property of the United States; and the Supreme Court of the United States has even refused to hold that Congress can subsidize anybody, even as a matter of policy. In the Sugar Subsidy cases, it expressly reserved the question as to whether the power to subsidize existed in Congress, and said that the moral obligation of the United States in that case justified the legislation.

Since the case of Brown against the United States there has been no question that under the laws of this country the power of confiscation of alien property, seized on land, was vested solely in Congress, and that the power, it being in derogation of the International Law, which was adopted in this country in its most improved form, as declared in Ware against Hildon, and in derogation of International right, the purpose to confiscate must be clearly expressed in the Legislative Act, and it must be performed in the manner and for the purpose prescribed by the Constitution and laws of the United States.

I will not read the authorities this morning, I will possibly refer to one of Mr. Guthrie's citations, but what I have said is established in the case in Ware against Hildon and subsequent cases where it has been held that under International Law, there was no right to confiscate property seized on land outside of the war zone, but that by Municipal Law, that right might be asserted, the power existing in the legislative body of the Government, I am speaking of a right under the International Law, but that the power might be asserted by Municipal Law; and Chief Justice Marshall held in Brown against the United States, that the property seized by the United States under an Alien Property Act, almost similar in terms and in purpose to the Act now under consideration, was not

confiscated; that the Act was not confiscation but a sequestration Act, and that only by the clear and definite intent and purpose of Congress, expressed by legislation, could the power of confiscation, which resided in Congress, ever be exercised.

Following then Brown against the United States there have been any number of decisions along the same line; and here I want to point out with your Honor's permission, a very curious position which I assume is taken by counsel on the other side inadvertently. Counsel on the other side have referred in a number of instances to the war power of the President, as Commander-in-Chief of the Army and Navy of the United States. Now, if your Honor please, under that war power of the President, he may seize property in the military zone, and do those things which a military commander can do. He has also many other powers. But the sequestration of alien property, and the handling of alien property is not under the war power of the President. Without Municipal legislation on the part of Congress, the President can not sequester or seize alien property in time of war. It requires municipal legislation, as stated by Chief Justice Marshall, in Brown against the United States.

Now, let us see if I am right. In the case of Stoehr against Wallace, 255 United States, construing this Act which was decided by the Supreme Court recently, Mr. Justice Van Deventer, in that decision said:

> "The Trading with the Enemy Act, whether taken as originally enacted, October 6, 1917, or as since amended, March 28, 1918, November 4, 1918, July 11, 1919, June 5, 1920—"

that is an Act for the return of certain property, and those are all the amendments—originally, or as amended, it is strictly a war measure, and finds its sanction, or not, in the war power of the President.

"Finds its sanction in the constitutional provision, Article I, Section 8, Clause 11, empowering Congress 'to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.' Brown v. United States," etc.

Now therefore unless Congress vested in the President, or in some other officer of Government, which it did, and could do, the carrying out of this war power, which was exclusively a legislative and Congressional power, that is, unless it vested the administration of this Act and its administration features in the President, the President had nothing to do with it, except as an executive to approve the Act. Now, let us see here again if the President had anything to do with it—I am speaking in the legal sense. Of course he had a great deal to do with it in the moral sense, but I am speaking now strictly of the legal sense. What powers therefore did Congress confer—that is the question before us. The President, as I pointed out in my opening statement, was not exercising his constitutional functions; that is what I meant when I referred to constitutional function—that is the function of the Commander-in-Chief of the Army and Navy. He was not exercising those powers. He was exercising a power conferred by Congress under the Congressional war power, and could therefore only exercise such powers as Congress confers and subject to such limitations as Congress imposed. That is the simple law of agency.

Let us see what were the powers and limitations. Counsel on the other side have fallen into another very curious inadvertence here, if I may suggest it. If your Honor had not read this Act, and had listened to their very delightful arguments on the Act, I am sure that you would have reached the conclusion, as any one else would have done, that the power of sale

given by this Act, was vested in the President, and we have had a great deal here to say about questioning the right of the President to exercise the power of sale. But no such power was vested in the President. What was his power, and who had the power of sale and what were the limitations? The limitations imposed by the Act would have been the same whether imposed upon the President or anybody else, except that there is a certain consideration for the office of President, which is unavoidable, and which is natural and proper. It is psychological. But the law on the subject has been stated by the Supreme Court of the United States, discussing this very question. The acts of executive officers of the United States or heads of departments acting in the name of the President, are his acts. Nothing is better settled than when an executive officer acts, like the Secretary of War, it is the act of the President, if it is within the scope of his powers. But the law fixes the powers. The law was stated in the Floyd Acceptances case, as to the power of government officers:

> "The answer, which at once suggests itself to one familiar with the structure of our Government, in which all power is delegated, and is defined by law, constitutional or statutory, is, that to one or both of these sources we must resort in every instance. We have no officers in this Government, from the President down to the most subordinate agent, who does not hold office under the law, with prescribed duties and limited authority. And while some of these, as the President, the legislature, and the Judiciary, exercise powers in some sense left to the more general definitions necessarily incident to fundamental law found in the Constitution, the larger portion of them are the creation of statutory law, with duties and powers prescribed and limited by that law."

Something has been said by Mr. Guthrie about the unseemly character of any action or words which ques-

tion the acts of the President of the United States in time of war. I agree wih him that this should be done with great care. In the discussion of this case, I do not mean to suggest that the great President of the United States who led us through this war ever thought of using any power that he had for improper purposes, but no man, however great, could personally consider and pass upon all the questions he had to determine in the crush of that duty. If he was mistaken as human beings are mistaken, or if he was badly advised, as human beings often are, the highest and the lowest, and has made a mistake, then it is not only the right, but it is the duty of the Government of the United States, representing all the people in their continuing, and I hope, eternal capacity, to question the exercise of that power, and to restrain it, with deference and consideration, within the limitations imposed by law. If we have any doubt about that question, turn to the case of the United States against Lee—

THE COURT: I am familiar with that.

MR. ANDERSON: Your Honor is familiar with the case?

THE COURT: Yes.

MR. ANDERSON: But if there was ever a question where every possible tendency would have been to sustain the acts of President Lincoln in taking possession of the property at Arlington, in the heat of a Civil War, where the soldiers of the country were buried in its soil, and every consideration was in favor of sustaining the war Act of the President, it was in the case of the United States against Lee; but it will stand as the eternal monument to the impartiality and the greatness of the American judiciary, that even against the leader of what was known as a rebellion against the authority of the United States, the Supreme Court raised its hand and said—no, it can not be done. This is the law today and the law is supreme.

I may add that this principle is universal, and did the occasion require it, as it does not, I should not hesitate to come into this Court, representing even an enemy of my country with the capacity to sue with the assurance that the Courts of the United States would administer justice according to law with even greater care, and with as much freedom from human passion, where rights of former enemies were involved, as they would in the case of the humblest citizen of our own country, or the government itself.

Now, in the light of these authorities, let us examine this Act. The Alien Property Custodian, not the President, "shall be vested with all of the powers of a common law trustee"—that is a direct power—"in respect of all property, other than money, which has been or shall be, or which has been or shall be required to be, conveyed, transferred, assigned, delivered, or paid over to him in pursuance of the provisions of this Act, and, in addition thereto,"—

Now, up to that point, the President is not mentioned. The power is in the Alien Property Costodian. He acts as trustee—

> "and, in addition thereto, acting under the supervision and direction of the President."

Merely a supervisory power, not power, but the right to supervise—"under the supervision and direction of the President, and under such rules and regulations as the President shall prescribe."

Who shall have the power—the Alien Property Custodian—

> "to manage such property and to do any act or things in respect thereof or make any disposition thereof or of any part thereof, by sale or otherwise, or exercise any rights and powers which may be or become appurtenant thereto or to the ownership thereof in like manner as though he were the absolute owner thereof."

Now, if your Honor please, in the discussion of counsel on the other side, all those words were tied up to the President of the United States. He had the power to sell; he had exercised the power of sale; he was the absolute owner; and he had all these things to do. This is not the case as to any one of them. They are every one vested in the Alien Property Custodians, and the power and the duty of the President under this Act of Congress, from which he gathers all his power, and accepts them under its limitations—the power and duty of the President is the power of supervising and directing and prescribing rules and regulations for the exercise by the Alien Property Custodian of the authority and power conferred directly upon the Alien Property Custodian.

Therefore, with the exception of the question of whether the President could or did confer power upon Mr. Polk, or did exercise the powers given him in the next sentence, which I will read, the power of the President is not involved here. We are not discussing the rules and regulations prescribed for the exercise of those powers by the Alien Property Custodian. This was the Alien Property Custodian, who had this power, a subordinate officer of the Government.

Now, let us look ahead. Where does the President come in? But before I leave that sentence, I want to call attention to one thing. Yesterday, the distinguished counsel for the defendant, then addressing the Court, emphasized the words "or otherwise," in the statute, and read the power into the Alien Property Custodian to confiscate the property of enemy aliens into that word; the power is not vested in the President. It is the Alien Property Custodian who is thus claimed to have the power to confiscate property through the word "otherwise."

I could present to your Honor at the present time any number of authorities construing that exact

phrase, and without exception they hold that under the familiar doctrine of *ejusdem generis,* "otherwise" applies to similar methods. He could have leased this property for long-term. He could have exchanged this property for other property. He could have made any disposition of the character of the nature of a sale, having the same result, that is, a transfer of property to another, for a valuable consideration, representing the fair value of the property, which a trustee must always get. That is all "otherwise" means, and all you can read into it.

By that sentence, therefore, we find the Alien Property Custodian vested with a power of sale, with the President having only this limited control and supervision, by establishing the rules and regulations, the road by which he could travel, and the fences along that road. Now, let us take the next—"Provided"—here is a limitation upon the power of sale. I agree that the Alien Property Custodian can sell or dispose of the property with the same legal effect as if he were the owner, subject to the terms of the trust. That is given in wills to any number of trustees. It merely means that he can perfect title without obligation to the purchaser, to look to the application of the purchase money, which is provided with respect to trusts. It does not give him the right to divest himself of the trust imposed upon him, and which would be imposed upon him if the word "trustee" did not appear in this Act, because trusteeship is the result of the powers imposed, and the obligations imposed, and not the use of words. Absolute words may create a trust if they result in such relationship.

Now, let us take the provision, this power of sale, this limitation—"That any property sold under this Act,"—they have not said anything about giving anything away yet—"any property sold under this Act, except when sold to the United States," "shall be

sold," first, only to an American citizen, second, at public sale, third, to the highest bidder, fourth, after public advertisement of time and place of sale; fifth, it shall be where the property or the majority thereof is located. Those are the limitations, and you have got to follow that rule; but here now we have a subsequent power in the President at last—"unless the President stating the reasons therefor, in the public interest shall otherwise determine."

What does "otherwise determine" mean? It means that he can determine whether there shall be a public or private sale. He can do that. It means that he can determine whether it should be sold to an American citizen. He can sell it to an Englishman or a Frenchman; he could not sell it to a German, but he could have sold it during the war to anybody but an enemy. It may be that he could have sold it to other than the highest bidder though I express no opinion on that. He might have said I will not sell it to the highest bidder in view of all the circumstances, as long as it was a fair sale. "After public advertisement." He might have waived that, as well as time and place. Now, there is a Charter fixed by the Congress of the United States, and beyond that the Alien Property Custodian or the President or anybody else could not go, and there is not a suggestion of anything but a sale. Now, there is one other power in that section given to the President: "Provided further, That when sold at public sale, the alien property custodian upon the order of the President stating reasons therefor, shall have the right to reject all bids"—

Shall the President have the right to give it away—not at all—"reject all bids and resell such property at public sale or otherwise as the President may direct." Under this section there are three powers given the President—first, the power to prescribe rules and regulations to govern the Alien Prop-

erty Custodian in the exercise of the substantive powers conferred upon him direct by Congress; second, the power to sell privately or to modify the conditions of sale prescribed by this Act. I have enumerated them; and his power is limited to those conditions. He can not go beyond them. Third, to set aside and reject a bid at a public sale, and re-sell. He can not reject a bid and say: I will let somebody else have it, or give it away. If he rejects the bid, he has got to order a re-sale at public or private sale.

The President's power is regulatory, as to every one of them. The power of sale is vested only in the Alien Property Custodian.

Having sought to make the Act clear, I will come to your Honor's question of yesterday more specifically. I have now laid the foundation of what I want to say, and in that connection I wish to say further that there is not a suggestion of confiscation in all that business, not a suggestion. If your Honor will turn to the general provisions of the Act, you will find every one of them are inconsistent as Chief Justice Marshall pointed out, in Brown against the United States, with any idea of the intent of Congress to exercise the questionable power of confiscation; and when I say questionable, I mean questionable as to propriety and policy, and not as to power if exercised by Congress.

Therefore, you find not only that statute, but every Act of Congress since, has recognized the trust relationship with respect to alien property, and even so late as the Winslow Bill, the express words are used: "that the Alien Property Custodian may pay over property held in trust by him to certain persons"—

THE COURT: For whom?

MR. ANDERSON: They would not say for whom. Congress having designated the beneficiary to the extent of the payment authorized, he immediately be-

comes trustee for the beneficiary named. Up to that time, he was trustee for such beneficiary as Congress might name, although there was an undefined or contingent right in the persons who originally owned this property, which could not be disregarded until Congress cut it off. Now, Congress,—to leave no question on that as to the construction of the law,—Congress declared that any claim to this property, or the proceeds thereof—there can not be any proceeds if we are going to confiscate, there are no proceeds if you confiscate, because the proceeds have gone into the public Treasury. They are the public property: "any claim to this property or the proceeds thereof, shall be settled as Congress shall direct."

Therefore Congress was to determine who should be the beneficiary of the trust, and it declares by amendment to Section 7 of November 4, 1918, that the right and the sole right of the person whose property was seized or sold under this Act, shall be as against the proceeds thereof. If you are going to confiscate it, why do you give anybody the right against the proceeds?—Of course the whole Act is inconsistent with any such idea; and the Courts have held, without a single exception, that this is an act of confiscation. Now, if it were not an act of confiscation, then of course, it necessarily must be a trust. I do not care whether you use the word "trustee" or not, because if you take property in trust, you are merely holding it as an officer of the United States, because he always holds property in trust for the people of the United States in one sense; but when you take the property of an alien to which primarily the officers of the United States owe no obligation, and Congress, in allowing you to take it says that you shall hold it and administer it not only as trustee, but that you shall finally dispose of it to such persons as Congress may direct, necessarily you hold the legal estate for the benefit of

the people who have an interest in its final disposition, which interest may be perfected only by Act of Congress. That is undoubtedly the legal effect.

Taking that situation, let us deal with the question of discretion. If your Honor please, I will yield to no one in my conception of the unassailable character of the discretion, political discretion vested in the legislative and executive branches of the Government of the United States. I am a nationalist. I am as a lawyer a follower of John Marshall and I believe in the principles which he taught, but I also believe as John Marshall said, that this is a Government of limited powers, and while we respect that discretion, when it is clearly given it is the duty of the Court to say where the limits are.

Now, I entirely accept Mr. Guthrie's argument as to the philosophy of the law on this subject. It would be an unthinkable thing that the political discretion of the President of the United States, in time of war or peace, should be drawn into question by a Court, and he be required to justify the exercise of that political discretion, just as it would be an unthinkable thing that the Congress of the United States, or the legislature of this State should be called into Court to say why they voted for a certain Bill, and why they thought certain legislation was wise. We do not need any argument on that in any Court. In the review of Acts of the legislature, the sole question is one of constitutional power. The power being conceded, then the wisdom is not subject to review. In the review of acts of the Executive, who is an agency for the administration or execution of the law, there are two questions, or to speak more accurately, there are two divisions to the question of power; the one is the question of constitutional power, which is very indefinite, —or political power. As to the political discretion, there can be no question whatever that the Courts can

not review it, and the decisions cited by Mr. Guthrie, are merely decisions illustrating that truth. For instance, the decision of your Honor in the Dexter case. There the Act gave the President the power, when he found it to be necessary in the public interest, to take certain property over, the railroads, and also gave to the Railroad Administration, the power to seize certain coal, when it was in the public interest, and gave power to the President to fix the price, I do not recall all the details.

The question of when the necessity existed, would not be subject to review, because that is a question which takes into consideration the welfare of the United States, and that is a matter of discretionary consideration, on which two men might honestly differ; and if the Court undertakes to exercise that discretion it puts its judgment in the place of the elected officer, that is obvious.

Then there are administrative powers in the executive. The question then is whether the administrative officer, in the exercise either of an administrative duty, which is subject to mandamus, or in the exercise of administrative discretion, which is not subject to mandamus, is acting within the scope of the agency which he is exercising; that is, where the power of his agency is fixed and limited by the legislative act. The constitutional power is very indefinite. For instance, take the Martin case. That case involved the right or the power of the President to call out the militia. It had already been passed upon by Chief Justice Marshall. The Court said that it could not review that power, because Congress had said that whenever in the opinion of the President it was necessary in the public defense, or even in anticipation of a condition requiring public defense, to call the militia into active service, the President could do it. He was the Commander-in-Chief of the Army and Navy, and

the only person to do it, and the exercise of that discretion, as to when that necessity arose, was not subject to review by the Courts. That is obviously true.

The Dakota case, as cited by counsel, involved a question as to whether the Executive ought or ought not to have dealt with the Telephone Company, or some officer of the Government exercise that discretion. That was a question whether the public interest required the exercise of powers admittedly conferred upon him by Congress, and you could not inquire as to whether the discretion was good or bad.

Now, take the Burleson case, which was reversed, but I am perfectly willing to take the opinion as it stands. It holds nothing further than that the exercise of a discretion to determine when the necessity for an act arose in the interests of the public, which involves the consideration of the welfare of the public, is not reviewable, but it is reviewable as to whether the President or anybody else, and especially a subordinate officer like the Alien Property Custodian, acted within the scope of his agency created by Act of Congress. In the Burleson case, Judge Hand used an expression which is extremely interesting in this connection, and brings to your Honor's attention a phase of this act which counsel have not commented upon. Judge Hand says: "It is true that Congress might, if it chose, have required the President to state the occasion which he thought made his possession necessary and the uses to which he would put it; but that is not the point."—Congress did not. Congress might have done this. Now, in this particular act dealing with the delicate trust with respect to the Alien Property Custodian, it did do it.

THE COURT: Are those cases subject to judicial review?

MR. ANDERSON: Undoubtedly. As one of the decisions cited by Mr. Guthrie said, in regard to re-

view, one of the later decisions of the Supreme Court, the name of which I do not recall for a moment, such executive acts would not be reviewed, they would not be set aside if they were clear, or if they were reasonably clear; I will put it stronger still—unless the reasons given were clearly insufficient. The President here is exercising, not a broad constitutional function, but the function of a limited agency requiring him to give the reasons for his acts. Those reasons are subject to review, and especially are they subject to review, if it appears from the very statements themselves that they were founded upon a mistake. Now, I will come to that in a minute. In the case cited it was being contended before Judge Hand that the Court might review the reasons and ascertain whether those reasons were sound, which induced the President to take over the railroads, we will say, or whatever the thing involved was. Does your Honor wish to stop here?

THE COURT: Go on.

MR. ANDERSON: It was being contended there when no such limitation existed upon the Presidential acts, that the Court could find out whether the reasons justified the President in fact, under the terms of the law, in taking over the property. Judge Hand says —it is true that Congress might, if it had chosen, have required the President to state the occasion which he thought made his possession necessary, and the uses to which the property should be put. If Congress did choose to so require the President or any other agency of the Government to state such reasons, then, necessarily, the Court must ascertain, or somebody must ascertain, whether the President complied with that requirement. The validity of his reasons, of the Alien Property Custodian or anybody else, in the absence of very strong evidence to the contrary, would

be accepted; but if his mere statement of any reason would be sufficient, then, you avoid the entire provisions of the act, because what is the use of requiring him to state his reasons in the public interest if you cannot ascertain what his reasons were?

THE COURT: Would it interfere with you if I state my difficulties there?

MR. ANDERSON: Not at all, sir.

THE COURT: My impression is that those reasons were required, not for the purpose of judicial review, but so that the President might not for secret reasons, or in the absence of any reason, have to give an account before a jury, or a body, to pass upon those reasons, or even before Congress, with its power of impeachment, or the power of the public exercising its authority through the ballot box—

MR. ANDERSON: I am entirely willing to accept that view.

THE COURT: That is not a conclusion, so that I will get you to give me, if you disagree with that, your authorities, if you can find them.

MR. ANDERSON: Yes, I will. Your Honor has stated what is in fact a debatable question. I think the authority read by Mr. Guthrie this morning, I do not recall the name of the case for the moment, in which he stated that in the review of authority under legislative act, the lack of reason must be obvious, in order to have the Court review it, but that power to review existed. Now, the power to review exists, but it will not be exercised—every reasonable presumption will be given in favor of the validity of the act. I agree as to that; but the power of this Court to review, exists under the terms of this act, while it did not exist under the terms of the act reviewed by Judge Hand, and Judge Hand recognized that. I wish to make that point clear.

There is a third phase of the exercise of administrative, as distinguished from constitutional, discretion, or as distinguished more clearly from political discretion, and that is that the discretion must have been founded upon a reasonable knowledge of the facts.

Mr. Guthrie in his very able and delightful argument this morning conceded that if a fraud were practiced upon the President, that that could be reviewable by the Court, and would operate to invalidate the act, or at least make it void at the time, or, as was said by one Judge: "No act is so solemn, no transaction so complete that fraud will not vitiate it;" but fraud is not the only ground. Mistake—honest mistake is just as effective as fraud, because every transaction to be valid must involve the intentional exercise of a mental process to a certain result. In a contract, it must be the meeting of the minds. If it be the unilateral act, it must be an act to accomplish a certain purpose predicated on certain facts, and an error, whether induced by fraud, or a mistake, is always a ground for review of an administrative act of that character. Mr. Guthrie referred to the case of the United States against Barlow. That is one authority to which I wish to call your Honor's attention, because I raised this point last night. Of course, as he pointed out this morning, and as we all know when the Cabinet officers exercise their powers—they not being provided for by the Constitution at all, the whole executive power being vested in the President—they exercise it at the command of the President, their acts and the acts of the President. Therefore the rule of law with respect to administrative acts, and the review thereof, including administrative discretion, is quite the same with regard to a Cabinet officer as the President. It must be, as a matter of course.

Now, in this case, which is the leading and controlling case, the Postmaster General made a contract for the carrying of mail over the mountains in Colorado. At certain seasons of the year this road was quite impassable on account of snow. The mail contractor represented to the Government that he could carry this mail around the mountains, a longer distance, but that he would require more teams and men, and on that idea the Government awarded, and finally paid to him, considerable additional compensation.

The question came up, and it was charged that this mail contractor was guilty of fraud, but the Courts waived that aside. Of course, they said if it was fraud, it would end the whole thing, if he induced the payment by fraud. This is what Justice Field said:

> "We admit that where matters appertaining to the postal service are left to the discretion and judgment of the Postmaster General, the exercise of that judgment and discretion can not in general be interfered with, and the results following defeated. But the very rule supposes that information upon the matters upon which the judgment and discretion are invoked is presented to the officer for consideration, or knowledge respecting them is possessed by him. He is not at liberty, any more than a private agent, to act upon mere guesses and surmises, without information or knowledge on the subject."

Now, with regard to political discretion, the President can act upon guesses or surmises, or he can act arbitrarily. As has been so often said, the only remedy is by impeachment or by the ballot box. But when the officers of the Government of the highest and the lowest, as stated in the cases, come to exercise the administrative discretion of the Government, then the exercise of that discretion must be predicated upon a

correct state of the facts or knowledge of the subject. Then the Court said:

> "If the defendant . . . intended no fraud by his letter . . . if, in contradiction to his positive assertions, his testimony can be taken, that he did not know at the time anything about the matter in relation to which he was writing . . ."

In other words, he said he did not know. He thought that was true when he wrote it, but he could not know, because he never had tried, he did not know anything about the matter—

> "and that the officers of the department were well aware that he had no knowledge or information on the subject; then they acted upon his guesses only, and not upon evidence upon the subject, and their decision cannot be received as conclusive.
>
> "It would be, indeed, a mischievous doctrine in its consequences if a decision thus made could preclude the Government from recovering its money, paid for additional stock and carriers, which were never required and never employed in its service."

And I may say, your Honor, that it would indeed be a mischievous doctrine if the President or the Alien Property Custodian could have founded action on their part in the execution of the sacred obligations imposed by this act, upon a mistake of fact or a misstatement of the fact, however honestly made, and thus prejudice the United States in its rights or obligations, when, if they had known the truth, we may assume they would not have so acted.

Therefore, under the three conditions regarding the review by this Court of discretion of the executive or of the subordinate officers of the Government, there is a natural disposition to hesitate when we approach

the Presidential Office, the rule of law is the same as stated in the Floyd Acceptances case.

The three rules are that the exercise of political discretion, either legislative or executive, can not be reviewed. The power being conceded, that ends the matter so far as legislation is concerned, because it is not administrative action. The exercise of administrative discretion may be reviewed in several instances. First, when the exercise of that discretion is not within the terms of the Statute, by which it is given, that is the act of the legislature. That applies to political as well as administrative acts—it is a question of power. Second, to ascertain whether it was exercised in accordance with the act, that is, the method prescribed; and further whether it was exercised upon a reasonable knowledge of the facts, so as to make it an actual exercise of intelligent discretion. Judicial discretion would not be judicial discretion if the Courts undertook to go up on the bench and decide a case without reading the Pleadings, and without knowledge of facts and that would not be a judicial discretion at all.

The same thing applies here. Therefore it follows that in this case, since the act of the Congress is the chart by which we must go, if it should appear that the President even undertook to vest in Mr. Polk a discretion of which he could not divest himself, or to vest it in Mr. Polk as an individual and not in an office, or that Mr. Polk did not exercise it as an official, and did not intend to do it; if it should appear that he undertook to go beyond the discretion vested in him by the act to order private sale or do away with public advertisement, or anything of that kind, but in effect undertake to give away this property or to sell it under conditions which would not make it a fair sale, then these acts would be subject to review in the Courts.

That brings us back to the intent of the whole act. These gentlemen must either take this as a sale or as a confiscation—it cannot be both. One moment they say it is a fair sale because there was a fair consideration and the next minute they turn around and say it was within the power of the President to give this property away and they need not try to get a fair price for it, that the money consideration was a very small matter.

We had much to say about the President in this matter. As a matter of fact, the President never took but one act in connection with it, all the rest was done by the Alien Property Custodian, and he was the officer authorized by law to make the sale.

Therefore, in the argument and the conduct of this case when I say the President, except in the limited sense stated, I mean the Alien Property Custodian. I say the Alien Property Custodian in making this sale, under a mistaken sense of his duties, possibly with the highest motives, believing that he was rendering a public service, went beyond the scope and the intent of this act. If that is true, the sale is void at the instance of the United States and the property must be returned to the United States, to do with as Congress shall determine, and not as the Court or anyone else may think best.

And that brings me to the last point, with which I will finish in just a moment. Your Honor asked yesterday what is the present power of Congress. Your Honor rather indicated this morning something of your view on that subject. I would suggest with all possible deference that that is not a question before the Court in this case.

THE COURT: I am inclined to agree with you and I do not think you need to argue that.

MR. ANDERSON: I will not.

THE COURT: Unless you desire.

MR. ANDERSON: No, sir, I do not. I merely want to make this statement—that under the Treaty of Versailles the full power of the disposition of alien enemy property is reserved to the Allies. There are sales of enemy property being made today under this act by the Alien Property Custodian, and the full power of disposition and the power of disposal of these patents, speaking generally, rests in Congress. Beyond that I do not care to go; because if the Government is entitled to the property back, then the question of what it shall do with it is a matter for Congress to decide.

In concluding, there were one or two points that I wanted to mention to make my position perfectly clear, and Mr. Kresel referred to them yesterday. They are minor points which we have not been able to carry in our minds, and your Honor has been so patient I will not take them up further.

THE COURT: You will all have a chance to be heard at the conclusion of the testimony.

MR. ANDERSON: Yes. I did want to say one thing, your Honor, on the question of estoppel. I do not think it is necessary for us to argue that question of estoppel at this time, but we will present to the Court authorities to show that there can be no estoppel on the Government of the United States. You may estop an officer of the Government personally from his assertion of a right, but not as an officer. Further than that, there can be no estoppel of the United States by the neglect or the mistakes of officers of the Government of the United States. We will point out those authorities, and I take it so far as this license to the Navy is concerned, which I did not refer to because, frankly, I have not had it in my possession, that the President has directed what shall be done with this property, and fixed the position of the Government with regard to it. This license only gave to the Gov-

ernment the right to manufacture and use these products created under these patents for its own use. That is, it could be used by them to operate Muscle Shoals—it would be only for its own use. Those are discussions which will come up in the trial of the case, and I do not think they are of sufficient importance at this time as bearing on the case for me to discuss them. I thank your Honor.

THE COURT: I am very glad to hear you, and it seems to me the arguments of counsel have led to this conclusion—that no evidence can be offered on the part of the Government that in the view of the defendant would be admissible, that the question from the standpoint of the defendant must be resolved in favor of the defendant on the issues of law raised by the Government's pleadings. From the standpoint of the plaintiff the only evidence that can be introduced by the defendant that would be relevant or legally admissible would be with respect to the value of the patents sold; that is, as to whether the price of $271,000 was such as not to shock the conscience of the Court and to make it a fair sale within the intent of the act.

Under those circumstances I suggest that in view of the fact that I assume the counsel engaged on neither side of this case will abuse the privilege, that each side take such testimony as it believes is proper in support of its case, reserving to the other side the right to full exception to that evidence, and that time be not consumed during the taking of the testimony in arguing questions which have been here presented. If there are some minor questions or some questions arise or are suggested by a question, those questions may be briefly argued; but inasmuch as the issue of fact is so narrow from the standpoint of the defendant and there is practically no issue of fact from your standpoint (addressing defendant's counsel), that is to be supported by evidence, I assume we can make headway

and do just as complete justice by letting each side put upon the record the facts upon which they desire to stand in the Appellate Courts.

MR. ANDERSON: That will be entirely agreeable.

THE COURT: Is that a satisfactory arrangement, Mr. Guthrie?

MR. GUTHRIE: If your Honor please, I do not think that you desired to preclude us from showing the surrounding circumstances under which this action is taken, under supervision of and by the direction of the President. That will necessarily involve showing the conditions which operated in his mind to warrant the approval of the plan outlined in the report of Mr. Palmer.

THE COURT: I did not intend to preclude either side from putting in any evidence that in the opinion of counsel for that side is proper matter for consideration, and I assume that you would contend, possibly properly, from my standpoint I do not pass on that now, that if the Government should attempt to support some of its issues by evidence you would feel it incumbent upon you to meet that evidence by the line of testimony which you suggest.

MR. KRESEL: Will your Honor give me a minute. Of course, Colonel Anderson has already stated that he does not abandon any of the allegations in his Bill. I do not understand your Honor to be ruling now—

THE COURT: I am not ruling on anything.

MR. KRESEL: (Continuing)—that this whole question is, as to our side, a question of consideration, as to the Government side a question of power. My understanding of your Honor's statement is this: Of course, we all have in mind the provision of the equity rule that even after objection the Court is bound to take the answer so that the Appellate Court may have the testimony before it, but that in view of the argument that has been had here and the narrowing of

the issues, so to speak, at least in our own minds and your Honor's mind, you look to counsel to be careful not to press the admissibility of evidence by argument or otherwise, at length, in the course of the taking of the testimony, and to put in, of course, such testimony as each side thinks is necessary to its case. That is my understanding of your Honor's suggestion.

THE COURT: And the thing that I expressly disclaim is that you should be guided in putting in your testimony by what I stated I conceive to be the Government's idea as to the only valid testimony that you could put in—namely, that the Government concedes, as I understood Mr. Anderson's last argument, that you are entitled to show, if you can, that a sale for $271,000 was a fair sale. You do not dispute that, I assume.

MR. ANDERSON: I do not dispute the right to put in the testimony as to the fair sale. I quite accept your Honor's view, for the practical reason, aside from the very great wisdom of your Honor's ruling on my suggestion at this time. Because we have argued every proposition that bears on the evidence. We have a right to put the evidence on the record anyhow, and all the Government shall do is to treat your Honor perfectly fairly; if a question comes up that has not been argued here we will just state our position in a few words or sentences, and very often not state it at all, but let it go on. Because if the objection is sustained it goes in anyhow.

MR. KRESEL: I think we all understand your Honor.

THE COURT: I give you as liberal power as I can give you without a resort to Rule 46 or further argument; because you all want this case when it goes up to have everything in the record, to enable the Appellate Court or the Supreme Court of the United States, or both, to decide it on the merits.

MR. ANDERSON: Exactly.

THE COURT: I assume that you are all ready to start with your evidence. We will begin that at one o'clock rather than now.

MR. ANDERSON: Yes, we would very much prefer it.

THE COURT: Then we will take a recess until one o'clock Standard time.

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AFTER RECESS

## PLAINTIFF'S PROOFS.

MR. ANDERSON: If your Honor please, this afternoon we will probably take up in introducing documentary evidence. Mr. Galloway will take charge of that and introduce that evidence in its logical order as nearly as practicable.

MR. GALLOWAY: Your Honor please, we have, in an effort to expedite the hearing of this case, entered into a stipulation trying to remove the necessity of proving the authenticity of certain documents. It is not the desire of counsel to cause that stipulation to be put of record at this time unless some differences occur between them, in which event we will ask your Honor to consider the stipulation, as we do not want to encumber the record with the same, as it is rather lengthy.

I think, perhaps, it might be well, as Colonel Anderson suggests, to read the stipulation itself and leave out the exhibits, so that the Court will understand the purpose of the stipulation and the purpose for which we are offering it here, in an effort, as I say, to expedite the trial.

The stipulation reads as follows:

"In order to avoid undue delay in the introduction of evidence and to facilitate the trial of the above-entitled cause, it is, solely for the purposes of this case and any re-trial thereof, stipulated and agreed by the respective parties hereto, by their respective solicitors of record, as follows:

I.

"*Documents, Records and Correspondence.*

"The respective parties may offer in evidence either original, duplicate, photostat, certified or other true copies of the documents, minutes of meetings or conferences, papers, records, accounts, letters of correspondence or any part or parts thereof listed and described in the lists hereto annexed, and identified as to each page thereof by the initials of one of the solicitors of record of the respective parties without formal proof of the execution, signing, delivering, transmission or recordation (where required) of any such document, paper, record, account, letter or correspondence, with the same force and effect as if the original thereof had been produced and the execution, signing, delivery, transmission and recordation (where required) thereof had been formally and duly proved *(but if and when offered*, the same shall be subject to the same objections, if any, as to relevancy, materiality and competence as evidence, which might be made to the original thereof if the same had been presented and duly and formally proved); provided, however, that either party hereto may at any time during the trial and before the taking of evidence is concluded, produce the original or a certified copy of any such document, paper, record, account, letter, or correspondence, or show that the copy so introduced is in any respect incorrect, in which event the original shall upon request be substituted for such copy, or the same shall be

corrected to conform to the facts as shown to the Court. Should the corrections made require the submission of additional evidence or the recalling of any witness, either side shall have the right to do so if the Court permit. The lists herein referred to need not be made a part of the record in this case, but an initialed original or duplicate of said lists shall be in the possession of counsel for each side and in the event of difference, may be submitted to the Court.

II.

*Testimony before Congressional Committees, Commissions and other Governmental Bodies, Public Statements, Books, etc.*

"That the testimony of witnesses and exhibits thereto attached or submitted by said witnesses, contained in the official Government publications of proceedings before Congressional Committees, Commissions and other Governmental bodies referred to in lists initialed as aforesaid, and statements of counsel therein contained; the official Government prints of the reports of the Tariff Commission, the Department of Commerce and the other Governmental Departments, officers or bureaus, referred to in such lists; the public addresses of representatives of the defendant, referred to in such lists; may be used by either side without formal or other proof of the authenticity or correctness thereof, to show that such testimony was in fact given, or that such statements of counsel, addresses of the defendant's representatives or reports of said departments, officers and bureaus were in fact made *(but if and when offered,* the same shall be subject to the same objections, if any, as to relevancy, materiality and competence as evidence, which might be made to the original thereof if the same had been presented and duly and formally proved); provided,

however, that this stipulation shall not be construed as limiting the legal effect of such official documents or reports. The aforesaid exhibits referred to in this paragraph, may be used by either side to the same extent as if the originals thereof were produced and formally proved, subject, however, to the objections, if any, as to competency, relevancy and materiality that might be made to the originals thereof, provided, however, that either party hereto may at any time during the trial produce the original or a certified copy thereof, or show that the copy so introduced is in any respect incorrect, in which event the original shall upon request be substituted for such copy, or the same shall be corrected to conform to the facts as shown to the Court. Should the corrections made require the submission of additional evidence, or the recalling of any witness, either side shall have the right to do so, if the Court permit.

III.

*Matter to be Read in Evidence Without Formal or Other Proof.*

"Subject to the objections as to competency, relevancy and materiality, copies initialed as aforesaid of the following may be introduced and read in evidence without calling witnesses thereon or making formal or other proof thereof, to wit:

"List of underwriters of The Chemical Foundation, Inc.

"List of stockholders of The Chemical Foundation, Inc.

"List of patents, copyrights, trade-marks, etc., reassigned by The Chemical Foundation, Inc., showing the assignee and the date of such assignment.

"Lists of patents, copyrights, trade-marks, etc., that have expired since the conveyance thereof to The Chemical Foundation.

"Lists of licenses granted by The Federal Trade Commission under patents, trade-marks, etc., involved in this suit, together with the identification of the patents so issued, the date of such licenses and the name of the licensees, the royalty rate and a statement of the royalties due under said licenses according to the records of the Federal Trade Commission.

"Copy of the testimony of Lee C. Bradley, Esq., before the sub-committee of the Committee on Appropriations of the United States Senate, 65th Congress, Second Session, on H. P. 13086.

"Statement from the books and records of the Alien Property Custodian showing the receipt of money from The Chemical Foundation, Inc.

"Uncertified copies and classified lists of any patents, applications, trade-marks, copyrights, or contracts and assignments thereof made by the Alien Property Custodian to The Chemical Foundation, and of any licenses issued by the Federal Trade Commission or the Chemical Foundation, Inc., covering any of said patents, applications, trade-marks, copyrights, or other similar rights.

IV.

*Facts Agreed.*

"The following facts are stipulated and agreed as facts in this case, to wit:

"That the ratification of the Treaties of Versailles, Saint Germain and Trianon was never advised or consented to by the Senate of the United States as required by the Constitution and said Treaties as such never became binding or obligatory upon the United States. Upon any trial or re-trial or any appeal of this cause either party hereto, or the Court, may read, refer to or use any copy of either of the Treaties of Versailles, Saint Germain en Laye or Trianon which may have been published and issued

by or under the direction of the Senate or any department of the Government of the United States to the same extent as if the said treaties had been introduced in evidence and made a part of the record in this cause.

"That neither the Imperial German Government nor the Imperial or Royal Austro-Hungarian Government or any successor or successors of said governments, or either of them, has complied with the conditions and provisions mentioned in the reservation contained in the Treaties of Berlin, Vienna or Budapest, respectively, nor of the joint resolution of Congress approved July 2, 1921. (Public Resolution No. 8, 67th Congress.)

"And it is further agreed that a letter from the executive clerk of the White House as to the dates of President Wilson's departure for Europe and his return to the United States during 1918 and 1919 and the date when he became ill, may be admitted in evidence on offer of the plaintiff, the plaintiff to furnish the defendant with a copy thereof prior to said offer.

V.

*Exhibits With Bill of Complaint and Answer.*

"The various exhibits annexed to the bill of complaint and to the answer in this cause (with the exception of Exhibit G annexed to the bill of complaint herein, which is covered by a separate stipulation) shall be considered and read as in evidence for the respective parties whose pleadings contain such exhibits in this cause, without being further or formally proved or introduced in evidence, but subject to the right to the adverse party to object to the same or any of them as being immaterial or irrelevant, by noting such objection, if any, on the record at any time during the trial and before the taking of evidence is concluded,

and the Court may rule upon such objection as if the matter so objected to were being then offered in evidence, and subject to the further right of either party to call attention to and have corrected any errors in said exhibits, if any there be, at any time during the trial."

MR. GALLOWAY: I might, if the Court please, just pause a moment to say that Exhibit G to the Bill was the exhibit which contained the long list of patents, and counsel for the plaintiff and defendant have agreed upon a correct list; and I think we have everything completed now except signing the stipulation to that, which we will sign in due time. The next is:

VI.

*Books of Account.*

"It is further stipulated and agreed that the defendant need not produce its books of account upon the trial unless the plaintiff specifically requests the production of some particular book or books; that either side may use transcripts or extracts from said books subject to the right of either party to call attention to and have corrected any errors in such transcript, extract or compilation at any time during the trial and that in connection with the testimony of any witness as to compilations based on entries in said books, it shall not be necessary as a basis for such testimony to put said books in evidence."

That is signed by myself as Special Assistant to the Attorney General, Solicitor for the plaintiff, and by Mr. Boggs, as counsel for defendant.

MR. ANDERSON: Was it not understood that was going into the record at this point?

MR. KRESEL: As I understand it, the stenographer was taking down what Mr. Galloway read, and of course it becomes a part of the record.

MR. ANDERSON: That is what I wanted to show, yes.

MR. GALLOWAY: If the Court please, I wish first to offer in evidence and read Exhibit M in the Bill of Complaint, which is, under the terms of the stipulation——

MR. KRESEL: Which is that?

MR. GALLOWAY: Exhibit M of the Bill of Complaint, being the letter of the President (reading): "The White House, Washington, July 1, 1922—"

MR. KRESEL: I doubt whether it is necessary to read it. Colonel Anderson has already read it to your Honor, I think, only this morning. If Mr. Galloway will just offer it, it can be considered as in evidence. Although from my point of view it is immaterial, I shall not object.

MR. GALLOWAY: If the Court please, it was read before in argument, but it has not yet been read in evidence, and we wish to do that now.

THE COURT: The letter is admitted without objection. I think, unless you press it, it need not be re-read. It is annexed as an exhibit to the Bill, and that may be referred to by this Court in the Bill, for the purpose of ascertaining its contents.

MR. GALLOWAY: If your Honor please, I wish next to read in evidence the letter written by the Alien Property Custodian to The Chemical Foundation, which is also a part of Exhibit M in the Bill of Complaint, and which has not yet been read to your Honor, so I understand it.

THE COURT: I have read it, and if it is for my benefit, you need not read it.

MR. GALLOWAY: I do not want to burden your Honor, but I wish to have it considered as read in evidence here, and if your Honor does not care to hear them, if you so indicate, I will not do so.

THE COURT: This, without objection, will be ad-

mitted under the same conditions as the letter of the President, and to ascertain the contents, reference may be made to the exhibit.

MR. MAHAFFY: May I suggest that these be numbered 1 and 2, to facilitate matters?

MR. GALLOWAY: I think we had better start that practice.

MR. ANDERSON: I suggest that these exhibits which are exhibits in the Bill be referred to by the number given them in the Bill, and then when we introduce any new matter, that that be referred to as Plaintiff's Exhibit No. 1, 2 and so forth. That is, if it is a paper that appears in the Bill, it will have the same exhibit number that it has in the Bill, and where it is a new paper being put in evidence, it will be identified by Plaintiff's Exhibit 1 and so forth.

MR. KRESEL: That is satisfactory.

MR. GALLOWAY: We wish next to read in evidence the letter by the Chemical Foundation, Inc., the defendant herein, to Thomas W. Miller, Alien Property Custodian, of July 15, 1922, which is also a part of Exhibit M attached to the Bill of Complaint.

THE COURT: Admitted under like conditions.

MR. GALLOWAY: We wish next to offer in evidence the executive order of the President, of October 12, 1917, and read therefrom Paragraphs 17 to 21, both inclusive, and Paragraphs 19 to 34, both inclusive.

MR. ANDERSON: Do you mean 29?

MR. GALLOWAY: Yes, I do. I beg your pardon. 29 to 34, both inclusive.

MR. KRESEL: Where will we find that, Mr. Galloway?

MR. GALLOWAY: That is in accordance, Mr. Kresel

—

MR. KRESEL: No; I say where will we find it?

MR. GALLOWAY: It is in the printed pamphlet.

MR. ANDERSON: That is No. 15 on the list.

THE COURT: Are you offering a physical exhibit?

MR. GALLOWAY: Yes. I think we will be able to offer this as a physical exhibit. It begins, Mr. Kresel, on page 22, and the particular portions to which I refer are on pages 25, 26 and 27.

MR. KRESEL: You are offering the whole order, are you?

MR. GALLOWAY: The whole order in evidence, and I ask leave to read certain portions thereof to your Honor.

MR. KRESEL: There is no objection on our part. I would suggest that the stenographer now mark, or the clerk or whoever does the marking in this Court, now mark in Mr. Galloway's pamphlet that as Exhibit 1.

MR. GALLOWAY: Plaintiff's Exhibit 1.

THE COURT: Will you present to the clerk, so that he may mark as Exhibit 1, the document which is now admitted?

MR. GALLOWAY: Yes. It begins at the center of page 22 (handing to clerk).

Received in evidence and marked "Plaintiff's Exhibit No. 1." (*See Exhibits, Vol. I, page 1.*)

MR. KRESEL: May I make this suggestion—at least, I want the instructions of the Court, as to whether it is your desire that the stenographer should copy these exhibits into the record, because it would make a tremendous record.

THE COURT: No. That is the reason why I say that if that was a physical exhibit, it can be offered instead of having it read.

MR. GALLOWAY: And the reading of the particular portion of it?

MR. KRESEL: If you insist upon it; although I see no purpose of even having the stenographer copy the part of the exhibit that you read.

MR. ANDERSON: Why could we not do this, if I may suggest, Mr. Galloway: That we offer the physical exhibit in evidence and then say "That I wish to read for the information of the Court certain part, but that not to be taken down by the stenographer." He just notes the exhibit. It would be for the information of the Court.

THE COURT: You rely mainly on certain sections?

MR. GALLOWAY: Yes.

THE COURT: You can tell me what those sections are without reading them in full detail, and you can probably tell me in three or four words what will take thirty or forty lines.

MR. GALLOWAY: I can tell you, if the Court please, that Sections 17 to 21 are the Sections in which the President delegates to the Federal Trade Commission the authority to issue licenses for the use of patents under the Trading with the Enemy Act.

Sections 29 to 34 are the provisions of the Executive order of October 12, 1917, under which the President vests in an Alien Property Custodian to be thereafter appointed, the Executive Administration of Section 7 and so forth, namely, the seizure, and similar provisions of the Trading with the Enemy Act.

MR. GALLOWAY: I wish now, if the Court please, to read in evidence a statement—

MR. ANDERSON: If the Court please, Mr. Kresel and I were just conferring. Of course, this is going to be an enormous record—

MR. KRESEL: Your Honor does not mind if we have these little talks aside. I think it is going to save time for everybody.

MR. ANDERSON: Our thought was this: If counsel in introducing in evidence an exhibit, makes the statement "I offer in evidence as Plaintiff's Exhibit No.— such and such document, and wish to direct the attention of the Court to such and such parts thereof," or

read it all, as the case may be then, if he read it all, if the paper required reading, there need not be any necessity for having it all appear in the record; or if you undertake to state the substance of it, that the stenographer be directed not to take down that statement, because the exhibit speaks for itself, and it will just duplicate the record thereby.

THE COURT: The difficulty in doing that is that you are leaving for the stenographer's determination what he shall and shall not take down.

MR. ANDERSON: I suggest in every case that he say to the stenographer, with leave of the Court, not to take it down.

THE COURT: So far as I am concerned, you can introduce these exhibits, and until there is objection you need not bother about telling me what they are, and when you have gotten them all in, then go ahead and tell me what the record is. That is, at the end of the session, when the stenographer need not be taking notes of it, because it will be in the nature of an argument or a statement of the case rather than the introduction of the testimony. So far as I am concerned, you need not tell me anything about the contents until say the beginning of the next session, the next morning.

MR. ANDERSON: Will your Honor permit us to state briefly the contents? We are following the paragraphs of this Bill, and tomorrow morning we would have to go back and re-state it all over again.

THE COURT: Then, state it as briefly as you like. I do not like to lumber the record up, but I have found from time to time sometimes we leave out just the thing which we want to have.

MR. MAHAFFY: If the Court please, would it not be better and probably save a disagreement between counsel, if counsel, when they offer exhibit number so and so, say "We rely on Paragraphs A, B and C,"

or "pages so and so, from a certain point to a certain point?" That would earmark the matter which counsel particularly relied upon.

MR. GALLOWAY: If the Court please, that is not practical for one reason especially, as some of these things may be pertinent to several paragraphs of the Bill of Complaint, and it would be very hard to confine them with any degree of accuracy to any one paragraph.

MR. MAHAFFY: I did not make myself plain. I was not referring to the Bill, but to the parts of the particular exhibit, rather than describing what it is.

MR. KRESEL: In other words, Mr. Galloway, we do not want to be bound by your construction what certain paragraphs provide.

THE COURT: You are not, and he is only indicating, without binding either side as to the contents of the exhibit.

MR. KRESEL: I am quite sure we all understand what we are trying to do.

THE COURT: So you may state as briefly as you can the information that you desire me to have with respect to any particular document that is in evidence.

MR. GALLOWAY: The plaintiff next offers and asks to read in evidence the statement by A. Mitchell Palmer, Alien Property Custodian, as the same appears in the Depository Manual, issued by the Alien Property Custodian; this being dated August 1, 1918, and being under Item 61 of the stipulation. I shall be glad to show it to Mr. Kresel (handing to Mr. Kresel).

MR. KRESEL: Will your Honor pardon me a minute?

THE COURT: Yes.

MR. KRESEL: If your Honor please, I have just read the exhibit that is being offered. It purports

to be a statement by Mr. Palmer—I say "purports"—I do not challenge the authenticity of it at all, but it purports to be an interpretation by Mr. Palmer of what he understood to be the effect of a certain statute.

Now, I have no objection to your Honor knowing what Mr. Palmer's interpretation was as written down here, but I trust that if we do not object to it, it may not be taken as an admission by this defendant that Mr. Palmer's interpretation was a correct interpretation if in point of fact—

THE COURT: Certainly not.

MR. KRESEL: If in point of fact your Honor should hold that his was not the proper interpretation. Have I made myself clear?

THE COURT: Yes. Admitted under those conditions.

MR. KRESEL: With that understanding, we have no objection.

Received in evidence and marked "Plaintiff's Exhibit No. 2." (*See Exhibits, Vol. I, page 12.*)

(Plaintiff's Exhibit No. 2 read by Mr. Galloway.)

THE COURT: Mr. Galloway, is it your purpose to read any of these at length now?

MR. GALLOWAY: Your Honor, we will try to avoid reading any more than we feel is absolutely essential, in order to call the Court's attention to things that are very pertinent, so that the Court may have it as we go along.

THE COURT: When I want to see the exhibits I can turn to the exhibit book, even if it is not copied in the record; and if it is copied in the record, it is confusing. Unless there is objection, we will get the stenographer now to strike out what you read, and simply make a memorandum there, "Exhibit read by Mr. Galloway."

MR. GALLOWAY: I see; that is, in order to shorten the record?

THE COURT: Yes.

MR. GALLOWAY: That is perfectly all right, your Honor.

MR. ANDERSON: I think it would be a violation against the rule against duplication anyway.

THE COURT: The duplication may be saved by not printing this in the exhibit book.

MR. ANDERSON: It would be better, I think, simply to leave out the reading from the record, and refer to the exhibit book.

THE COURT: The stenographer will now strike out what has been read by Mr. Galloway of the exhibit, and I will instruct the stenographer that whenever an exhibit is read he should not take down the reading of the exhibit, but simply make a memorandum to the fact that the exhibit was read. But, if any comment is made on the exhibit, that should be taken down.

MR. GALLOWAY: If your Honor please, the plaintiff now offers and asks leave to read in evidence Plaintiff's Exhibit No. 3, being the statement or rules and regulations of A. Mitchell Palmer, as Alien Property Custodian, dated June 6, 1918. This Item No. 47 on the stipulation.

MR. KRESEL: The objection that we take to it is the same that we took to the last exhibit, namely, that while we do not object to the Court having before it any rules or regulations made by the Alien Property Custodian, it is our claim that the defendant is not bound thereby.

MR. ANDERSON: If your Honor will permit me, I will state that the act expressly provides, and the Executive order appointing the Custodian provides and fixes his duties, and in fixing his duties it provides that he shall fix rules and regulations.

THE COURT: The paper will be admitted, with the privilege to each side at the time of argument to make such use thereof or to deny either the admissibility or the weight of it, if they so desire.

Received in evidence and marked "Plaintiff's Exhibit No. 3." (*See Exhibits, Vol. I, page 14.*)

(Mr. Galloway read from Plaintiff's Exhibit No. 3.)

The next provides with reference to the Auditor's report, and I am not going to read that unless your Honor wants that especially; and I go down to page 8 of this exhibit, which I do wish to read to your Honor, beginning "General Rules."

(Reads from Plaintiff's Exhibit No. 3.)

It sets out, if your Honor please, a proposed form of order and sale which I shall not read. I read again from page 13 of these Rules and Regulations, beginning "The sale organization."

(Continues reading from Plaintiff's Exhibit No. 3.)

MR. GALLOWAY: Your Honor please, we next offer in evidence and ask to read in evidence, the supplemental orders of A. Mitchell Palmer as Alien Property Custodian, dated July 16, 1918.

MR. KRESEL: To that, your Honor, we make the same objection as to the preceding exhibit, and I take it that your Honor will make the same ruling.

THE COURT: The same ruling.

Paper admitted in evidence, marked "Plaintiff's Exhibit No. 4." (*See Exhibits, Vol. I, page 27.*)

THE COURT: Do you desire exceptions noted to the rulings against you?

MR. KRESEL: I do not know what the rule is here, your Honor, and of course we do not want to lose the benefit of an exception. In some jurisdictions the Court simply orders the stenographer to note an ex-

ception to an adverse ruling, in favor of the party against whom the ruling is made. Perhaps that is not the way it is done in this District, and so, if your Honor will permit me, I desire to note an exception to your Honor's ruling on my objection to the preceding exhibit and now to this exhibit.

THE COURT: If you deem yourself properly protected by this ruling, you may rely on it. If not, you may ask an exception in each instance: Inasmuch as the indications are that the mass of testimony introduced on each side, will be over the objection of the opposing party, I suggest that it be understood that each side takes an exception to all rulings against it, unless it otherwise notes at the time.

MR. KRESEL: I think that is a very good suggestion, and we would like to have that done. Is that agreeable, Mr. Anderson?

MR. ANDERSON: It is entirely agreeable to me and I shall be very glad if each side will regard it as a stipulation that exceptions are taken to all adverse rulings of the Court, without further exceptions being taken, and this will apply to all rulings which may be adverse on an objection, throughout the trial.

MR. KRESEL: Yes.

MR. GALLOWAY: I wish to read this, your Honor, and ask the reporter not to repeat it in the record.

(Mr. Galloway reads Plaintiff's Exhibit No. 4.)

If your Honor please, we next ask leave to offer in evidence and read in evidence the Executive order of July 16, 1918, as the same appears upon page 54 of the printed pamphlet. If your Honor please, I do not wish to burden you with much of this, but I do wish to read a little of this—or I can state a summary of it as you wish.

THE COURT: Whichever you prefer.

Same admitted in evidence, marked "Plaintiff's Exhibit No. 5." (*See Exhibits, Vol. I, page 29.*)

(Mr. Galloway then read from Plaintiff's Exhibit No. 5.)

I wish to omit a portion, and go to paragraph 5 of this exhibit, if your Honor please.

(Continues reading.)

If your Honor please, we next offer in evidence and will ask leave of the Court to read a letter which we ask to have marked Plaintiff's Exhibit 6, from Ramsay Hoguet to Mr. Lee C. Bradley, dated January 24, 1918.

(At this point the discussion ensued among Court and counsel off the record.)

MR. KRESEL: May counsel, following out the suggestion that was just made by your Honor, state for our information the reason for the offer of this present exhibit. It is quite a long document. It is a letter and an opinion of counsel. We would like to know in what respect the Government feels that is material to any issue in this case.

THE COURT: No ruling has been made on this as yet?

MR. KRESEL: None at all. It was just offered.

MR. GALLOWAY: If the Court please, this letter, which I shall not read before I make the statement, is a letter from Mr. Ramsay Hoguet, then Patent Counsel of the Alien Property Custodian, to Mr. Lee C. Bradley, then general counsel of the Alien Property Custodian, being advice upon patent matters, which indicates grave doubts, if not a conclusion, upon the part of Mr. Hoguet, the patent counsel, as to the Alien Property Custodian's right to seize the patents, which is in accordance with the allegations, or rather in proof of the allegations of paragraph 15 of the Bill, where it says: "It was determined by the Alien Property Custodian and others charged with the administration thereof and under his direction, and by the Attorney

General of the United States, that said Trading with the Enemy Act as amended, did not authorize the seizure and sequestration or sale or other disposition of enemy-owned patents, copyrights, trade-marks, labels or other similar rights or applications therefor." We offer this, your Honor, under that paragraph.

MR. KRESEL: This simply illustrates the wisdom of your Honor's suggestion. We object to the exhibit as offered upon the grounds that from the statement of counsel, it appears to be immaterial and irrelevant. The date of this letter is January 24, 1918, and applies to the situation of the law with reference to patents as it then existed. Now, it is already before your Honor, with the amendment of the Trading with the Enemy Act, that finally authorized the seizure of patents, which was passed in November, 1918. Now, whatever opinions may have been entertained by the Custodian or his counsel, as to whether he did or did not have the power to seize patents before that amendment, seems to us to be entirely immaterial and irrelevant.

MR. GALLOWAY: If the Court please—

THE COURT: You need not argue it, Mr. Galloway. I say that notwithstanding that, I am at the moment inclined to agree with you, Mr. Kresel, but I am assuming, as I did this morning, at the close of the case, that counsel on either side will not offer anything unless they believe that it has some probable value in this case; and I shall extend the same line of reasoning, when you introduce your side, Mr. Kresel; because Rule 46 makes it necessary that it be put on record, in substance, in any event; and I think we can proceed more expeditiously, if we proceed by making rulings admitting the testimony offered, without in any way by such rulings indicating, or binding the Court in its final determination of the value of the evidence submitted, because a ruling that this document will be

admitted, does not mean under the circumstances of this case, that any weight or value will be attached to the documents or evidence so admitted, when the case is all in, and taken up for final consideration and determination. For that reason, and that reason only, I overrule the objection.

Mr. Kresel: Now that your Honor has made that ruling, it seems to me also that this is probably the proper time at which to make the objection, which I now make to this particular exhibit, upon the ground that if it be offered in evidence as a step in an attempt thereby, and by other evidence to seek to have this Court inquire into the reasons that actuated the President and under his directions, the Alien Property Custodian, in transferring these patents to the defendant, for the considerations that may appear in the evidence were paid therefor, and if it be the purpose in introducing this evidence and other evidence of a similar nature that may follow, to ask this Court to set aside this sale upon the grounds that the reasons that actuated the Executive and under his direction the Alien Property Custodian, that such evidence is incompetent, immaterial and irrelevant, upon the specific ground, among others, that the Court has no jurisdiction to pass any such judgment. I assume, as your Honor has already indicated, that your Honor will take the testimony; that your Honor will overrule the objection, and that in order that we may not waste any time in repeating such objections to further testimony upon the same line and for the same reasons, may it be understood that our objections shall lie to all such evidence when directed for the purposes that I have indicated?

The Court: And all other purposes that you have indicated in the arguments made at the opening of this case.

Mr. Kresel: Thank your Honor for the addition.

THE COURT: You may re-state your objections urged, so far as I am concerned, at the final hearing, and so far as I have power to give you that power, to urge in any Appellate Court, with respect to the admissibility or error, in admitting the testimony, and erroneous conception on my part of any principle that you have stated or referred to in your opening argument, because I think—now we have a new one, I am not excluding that.

MR. KRESEL: I understand that.

THE COURT: Now, this ruling does not go so far possibly as to indicate to counsel for the complainant that there is no limit to what they may do under that ruling. I do not mean that, because I think it will not be raised, but at the same time—

MR. KRESEL: Our understanding of the effect of Rule 46 even as to that, we do not understand the Court to sit and simply hear, as a person taking any testimony that is offered. The Court, of course, has the right to exclude testimony.

THE COURT: For instance, privileged communications.

MR. KRESEL: Yes. All right. We understand that, your Honor. Thank you.

THE COURT: Admit it.

Received in evidence and marked "Plaintiff's Exhibit No. 6." (*See Exhibits, Vol. I, page 41.*)

MR. GALLOWAY: If your Honor please, I will not read anything from this, but submit it in evidence with the statement I have made as to its purpose.

We next offer in evidence and ask leave to read a letter by Mr. Ramsay Hoguet, then patent counsel to the Alien Property Custodian—

MR. KRESEL: What is the date of that?

MR. GALLOWAY: To the Alien Property Custodian dated January 30, 1918, being No. 62, Mr. Kresel.

THE COURT: And its purpose being to support what allegation of the Bill?

MR. GALLOWAY: That is the same purpose as the previous exhibit, if your Honor pleases.

THE COURT: It is admitted under like conditions.

Received in evidence and marked "Plaintiff's Exhibit No. 7." (*See Exhibits, Vol. I, page 43.*)

MR. ANDERSON: I would like to state in view of Mr. Kresel's remarks and statement on the record, that in stating the purpose of these exhibits, we are following the paragraphs of the Bill paragraph by paragraph, and the primary purpose may relate to that paragraph, but the evidence will bear upon other paragraphs also in the Bill, and in stating the purpose merely for the purpose of introduction of evidence, I hope it will not be understood as a limitation upon the right to use the evidence for any legitimate purpose in the argument—I want to make that clear on the record.

THE COURT: Is that your understanding, Mr. Kresel?

MR. KRESEL: That is my understanding, of course, and that is the reason that I urge the larger objection, and upon the broader grounds, because eventually all this evidence must be directed to the basic purpose underlying this whole case.

MR. ANDERSON: Perhaps it will make it clearer if I make this additional statement: A great many of the allegations of the Bill, which are essential to the leading up to the ultimate issues, are either denied on information and belief, or without information and belief, sufficient to reply to. Therefore, in order to establish the allegations of the Bill as we conceive, it will be necessary, although they may be somewhat remote from the immediate issues, these proofs are necessary in the step, that is one reason, primarily.

MR. KRESEL: Of course, that does not at all settle the materiality.

MR. ANDERSON: Oh, no.

MR. KRESEL: Simply that you have read something in the Bill.

THE COURT: That does not change the ultimate result of the evidence when admitted, because mere allegations cannot make a case.

MR. GALLOWAY: If your Honor please, I wish to read just one or two lines from the Plaintiff's Exhibit No. 7, which was a letter by Mr. Hoguet, the patent counsel to the Alien Property Custodian, in which he says: "The Alien Property Custodian should not take over applications for Letters Patent nor Letters Patent."

The plaintiff next offers in evidence, and asks leave of the Court to read the minutes of the noon conference on April 6, 1918, being No. 56. This is quite short, so I will just read it.

MR. KRESEL: Let me see that. (Paper handed over.) With regard to this present exhibit that is being offered, your Honor, I think the wisdom of your Honor's suggestion made at the conference at your desk is apparent. This is an exhibit dated April 6, 1918. It consists of a single sentence, and I am going to ask the Clerk to let your Honor look at it, and then I am going to urge my objection upon the materiality, and see whether your Honor does not agree with me.

MR. GALLOWAY: All right.

(Paper handed to the Court.)

MR. KRESEL: Now, the reasons that actuated the Alien Property Custodian in coming to that determination, being dated six months before November 4th amendment, which dealt with the patents particularly with that doubt in the case that there was after it entertained the right of the Alien Property Custodian to seize or sell any of the patents before that

November 4th amendment, with that statement made to your Honor that the Attorney General subsequently reached that the Alien Property Custodian had no right to seize patents, and that therefore the amendment was asked for, does it not seem that this sort of thing is immaterial and irrelevant?

THE COURT: If I were called upon to rule upon it now if it were necessary or proper, in view of the widely divergent contentions of counsel for the respective parties, I should say it was wholly irrelevant and immaterial.

MR. GALLOWAY: If the Court please, I would like to make just one remark before we pass that, referring to the defendant's Answer where it says:

> "and on information and belief alleges that said Custodian would have exercised the right in respect of enemy-owned patents, to sequestrate and sell the same, but for the said determination of the Attorney General of the United States."

Now, here, if your Honor please, is—

THE COURT: Even if I should strike out these allegations, if it would expedite matters, until the case is all in, you cannot tell exactly what the fact evidence will lead to, and I do not think that those allegations at the moment are material, after what you indicated to me this morning and yesterday you were coming down to. I think it is wholly immaterial, but under the General Rule for the admission of evidence, I overrule the objection.

MR. GALLOWAY: I offer that. I will not read it under your Honor's ruling.

Received in evidence and marked "Plaintiff's Exhibit No. 8." (*See Exhibits, Vol. I, page 54.*)

THE COURT: In expressing my views on this, I did not mean to indicate that I shall express views upon each document offered, but shall merely make a ruling,

because I think the expression of views may be helpful either to you or to me or the Appellate Court.

MR. GALLOWAY: If your Honor please (discussion off the record).

THE COURT: We shall adjourn shortly, but will you offer it now?

MR. GALLOWAY: Yes, I will do so. The plaintiff next offers in evidence and asks leave to read the statement of Lee C. Bradley, Esq., general counsel to the Alien Property Custodian, before the Sub-Committee on Appropriations, United States Senate, Sixty-fifth Congress, Second Session, on H. R. 13086.

MR. ANDERSON: I do not think it is in the Bill.

MR. GALLOWAY: The statement is Exhibit A to the Bill of Complaint.

MR. KRESEL: I think, your Honor, it will take not more than a minute for your Honor to dispose of this exhibit, and preliminary to our raising our objections, will the Attorney General state in what respect he contends that to be material and relevant to his case?

MR. GALLOWAY: If your Honor please—

MR. ANDERSON: Do you want me to state that?

MR. GALLOWAY: Go ahead.

MR. ANDERSON: If your Honor please, it will further appear in this case that the facts presented to Congress and upon which Congress passed this Act, were to the effect that the necessity for this amendment or the desirability of this amendment arose out of the difficulty of the sale of physical plants and property without the patents which, as I explained in my opening statement, were not seizable by the Custodian prior to the amendment, and the seizures and the sale thereof in connection with plants and properties was in contemplation at that time by the Alien Property Office and all concerned, and was the limitation upon the seizure and sale of patents. That subsequently or about that time the members of the dyestuffs and

chemical industry, desiring to obtain control of these patents, not unknowingly, through some medium or agency, impressed upon the Alien Property Custodian a very much broader seizure of patents than was contemplated, and that as a result the transactions here spoken of were brought about by the trade improperly, as an inducement to the officers of the Government, in certain senses as alleged in the Bill. I have carefully avoided any personal reference in this Bill. I am particularly careful about statements in open court about people who are in business, in the industry, especially where they are not parties to the proceeding, and therefore I have not used any words of actual fraud. I said I hoped none would have to be developed, but it is the duty of the Government to put in its case fully and to disclose all those facts.

I am not going to argue at this time whether they are facts of sufficient importance or materiality to justify the action of a Court of Equity, but I want them on the record before this Court, when I come to argue, as well as the Court above, if I shall have to argue, a stronger position than I have had to take in the opening statement, desiring to be very conservative. I may have to do it or may not.

THE COURT: What particular effect would you give to that? Assuming that the facts are as you have stated, what legal effect would you give to them?

MR. ANDERSON: I would give this legal effect: That followed by other evidence which we shall introduce, showing a developed combination of these people to induce the sale of these patents, valuable Government property, that if it becomes necessary in the argument, as it may, we shall, the Government will insist that this case may probably develop a case of actual fraud.

THE COURT: You must have misunderstood me. My thought was just one step in advance of that. That

would be, to narrow the construction of the amendment passed pursuant to that representation or to declare those amendments null and void, having been induced by fraud.

MR. ANDERSON: No, sir; neither. The Court would have no power to declare the amendment null and void, in my judgment, and I do not think it can have any effect on the construction of the amendment, but it can have a very strong—it might possibly have some mental effect upon the construction of the amendment as indicating what Congress was looking to, the facts and circumstances. The Courts have held that reports before committees, under some circumstances, will be considered, but it is more to show development of a gradual scheme to get control of these patents. That may not be shown.

THE COURT: One of the first steps—

MR. ANDERSON: Showing of the case alleged in the Bill. May I put it that way, without going any further?

MR. KRESEL: Why be afraid of your own allegation? You mean that you are asking this evidence to be admitted as a step in the development of the conspiracy; is that it?

MR. ANDERSON: Put it that way, if you wish.

MR. KRESEL: All right. Do not let us be afraid of the word that you have used. You have charged a conspiracy; now, I am assuming that you are offering this in an endeavor to establish your allegation. If that be the point, I desire to be heard thereon.

THE COURT: I will hear you at 8:30 tomorrow morning, standard time.

MR. KRESEL: Very well, sir.

THE COURT: The Court is now adjourned.

(Whereupon, at 3:55 o'clock P. M., city time, adjournment was taken until tomorrow, June 7, 1923, at 8:30 o'clock A. M., standard time.)

## FOURTH DAY.

Wilmington, Delaware,
June 7th, 1923, at 9:30 o'clock A. M.

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*Before:*
HON. HUGH M. MORRIS, U. S. District Judge.

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Counsel present as before noted.

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TRIAL RESUMED BEFORE THE COURT.

MR. ANDERSON: If your Honor please, at the time of adjournment yesterday, there was, I believe, a question as to the relevancy or materiality of the statement by Mr. Bradley, being Exhibit A with the Bill. At the time of that adjournment, the question of its admissibility was under discussion; and I do not wish to say anything in that connection further than simply make a statement of our position, because I think it is a waste of time for argument under the circumstances.

The Bill in this case charges that the sale of these patents, among other things, was brought about as a result of a scheme or plan, or what is called a "conspiracy" to acquire this property for private interests. And therefore, of course, the latitude of evidence on this subject is very broad. Anything that has any remote bearing is admitted. This particular matter, in our view, bears upon that aspect of the case, as well as being necessary to a clear exposition of the surrounding facts and circumstances. Whether it should become necessary to consider surrounding facts and circumstances when we come to the argument of this case, its meaning and intent I do not think can be determined in advance, and therefore it may be

that in the final conclusion this matter will have little or remote connection with that aspect of the matter. It may be that in this Court or in the Appellate Court if the matter went there, that that may be deemed an important light and side-light upon the general situation.

Therefore, for both reasons, as tending to show the change of policy, and thus the effect, and indicating that some other influence was brought into the situation, and as also possibly bearing upon the construction of this quite complicated Act, it seems to me that the statement for what it is worth—I do not undertake to discuss its weight, is at least admissible in evidence.

THE COURT: Mr. Kresel.

MR. KRESEL: If your Honor please, I have given consideration to this proposition since our adjournment yesterday afternoon, and I think this affords a good opportunity to have another one of our basic understandings, because as your Honor very wisely said yesterday, this is a long case, and we better understand one another before we go very far into it.

Your Honor knows, of course, that this particular piece of evidence that is now being offered, was alleged in the Bill as having been the basis of the action taken by Congress in enacting the November 4th amendment.

Indeed, the Bill charges in the Sixteenth paragraph,

"That acting upon the faith of the representations aforesaid and solely for the purposes aforesaid" —the "aforesaid" referring to this testimony of Mr. Bradley, Congress went on and enacted this Act.

When Colonel Anderson in his opening was referring to this testimony of Mr. Bradley, I recall that your Honor asked Colonel Anderson whether he was claiming that, assuming that that testimony was misleading and that Congress acted on it and enacted the

November 4th amendment—whether Colonel Anderson was claiming that that either vitiated the Act or would lead the Court to construe it in any other way than its plain language imported. And of course Colonel Anderson is too good a lawyer to make any such statement, and he disclaimed it.

They are now abandoning the basis upon which they urged in the Bill of Complaint that that testimony was relevant and are now seeking to have it introduced upon the ground that it is some evidence in the support of the conspiracy that is alleged in the complaint.

It must be evident that it can be material upon the question of conspiracy only if it be connected with evidence that some one or more of the alleged conspirators induced Mr. Bradley to make that statement. Of course your Honor has no such evidence before you up to this point.

Your Honor could not have failed to observe that the charges of conspiracy in this complaint, while broad, are not specific. They mention some of the alleged conspirators and say that there were others. Among these conspirators they speak of the Textile Alliance and other corporations. These concerns are not parties before this Court in this proceeding. It seems to me that before your Honor permits any evidence to go into this case in support of a conspiracy, unless that evidence upon its face shows that it is a step in the conspiracy, it ought not to be admitted.

In other words, it is our position that until there is some evidence that there was a conspiracy, a statement made by an official before Congress, which upon its face purports to be an official statement, ought not to be thrown in here simply upon the vague statement that it may be material upon the question of conspiracy.

The Government cannot be aided by delaying in-

troducing this testimony; it will be here two weeks from now as it is here today. We claim it is only common fairness to the concerns whose names have been bandied around here, named in this complaint as conspirators, that any evidence which it is claimed is a step in the conspiracy, unless on the face of it it shows that, ought to be withheld until there is some foundation laid by real evidence of a conspiracy.

THE COURT: I will hear you, Colonel Anderson.

MR. ANDERSON: If your Honor please, I think that counsel must be allowed very considerable latitude in the introduction of evidence, subject always to the questions of law, and it is a matter of opinion as to the order in which the evidence is introduced. Their judgment must be largely controlled, so that the Court may of course withhold the exercise of that discretion.

I am not going into an elaborate argument on this matter, but to the charges in the bill of this character in order to build up the evidence in an orderly way, it is often necessary to put in at certain stages evidence which will have to be connected up at a later stage of the proceeding. Otherwise you confuse the documents, the story is all entangled, and nobody who has not made a very exhaustive detailed study can possibly understand its significance.

Therefore those are questions largely of the discretion of counsel to be finally tied up in the case and dealt with by the Court in the final hearing which before a jury might be more strictly construed. In so far as the question of conspiracy is concerned, as I have stated, and it is perfectly obvious from this Bill, the conspiracy charged of a plan or scheme to get control of these patents for private purposes affects both aspects of this situation; either the question of the trust relationship or the question of confiscation; and therefore any evidence tending to show that there was a change of policy, connecting that change of policy,

we may say, with the interests with which we are particularly concerned, in securing control of these properties, is a persuasive fact as tending to show that organization and that influence in the procurement of this sale.

Now, in order to show that change of policy, you have got to develop the entire policy of the Alien Property Custodian office, in order to show the steps in the change. In the other aspect of the matter while I would of course contend that a statement made in connection with an Act, by any Chairman of Committee, in reporting an Act, or any other matters introduced to Congress for the purpose of getting an Act passed, would authorize a Court to set aside a legislative Act, or would be controlling in its construction, it is sometimes of some little use or value, where there is a doubt as to the meaning and intent and proposed scope of the Act.

Now, these Statutes taken together, we have argued at great length, and I am not going to discuss them; but it is my view—or I would not offer this evidence that this matter, whether a controlling influence or not, taken in connection with other matters which are going to be put in as rapidly as we can, would have that effect. Now, in stating that, I take it that if you put the matter on the record, the only effect of excluding it would be to prevent its being read, and that this Court would not consider it; and therefore I suggest, with all possible deference, that that being the case, that an extended argument on this question to show it is going to be connected up, would be irrelevant, burdensome and a waste of time.

THE COURT: Assume, Colonel Anderson, if you will, for a moment, that the only relevancy or pertinency that this bit of evidence would have, is one of the acts, an overt act, if you please, of the conspirators, then it is your intention that such overt acts

may be shown prior to your having shown, *prima facie*, at least a conspiracy.

MR. ANDERSON: No, sir. I would not make that contention. I would say this, that in the putting in of evidence, that might be tentatively received, with the understanding, as a matter of convenience in the presentation, that unless the charge was sustained later, the evidence would be stricken out. That is frequently done, because it is very often necessary almost in the presentation of the case, but it would be tentative; it would be conditional reception of the evidence. Now, on the other hand, I would say that this is not presented as an overt act of so-called conspirators. I will endeavor to avoid the use of that expression, because I do not think it is necessary to use it too much, not as an overt act in that connection, but let me assume this state of facts to the Court: Let us suppose that the Alien Property Custodian had a fixed policy upon the original enactment of this statute, a policy defined by the Alien Property Custodian himself, let us suppose that by the amendment of March 28, 1918, that policy was enlarged and somewhat modified; let us further suppose what the documentary record and the exhibits show here clearly, that this legislation was procured by the Alien Property Custodian for perfectly proper purposes, but for an obviously limited purpose at that time the whole record taken together would show that limited purpose.

Now then, assuming that the Act of Congress was broad enough to cover a larger purpose, but for the purpose of the case let us further assume that it will appear that for some time after this Act was passed, its operation and execution was limited, its administration was confined to this comparatively limited purpose which was in view in securing its passing. Then let us assume that a situation developed, that we find those who not unnaturally, were deeply interested in

these patents and the effect thereof, came in contact with and were in constant communication with the Alien Property Custodian's Office and worked out a scheme or plan or conspiracy, if you choose to call it that, for obtaining these patents for private industries, and that, as the result or contemporaneous with such a transaction, there was an entire change of policy and a broadening of the policy by the Alien Property Custodian's Office, flowing immediately from such circumstances.

Now then, it would be perfectly legitimate, under the very broad rule of evidence, with regard to matters of that kind to show all of those facts, the development of all those facts. They would not be conclusive in establishing a so-called conspiracy. Their weight might be comparatively small or great, but as your Honor knows, the Supreme Court has said that you can not prove transactions of that kind where all the parties are adverse, except by putting in all the facts and circumstances which point to a certain result, and from which a conclusion, if properly sustained can be drawn by the Court. This is only one circumstance. It may be one of comparatively little importance; and the fact that it is pleaded as showing that that was the sole consideration which induced Congress to amend this measure, that is pure conclusion. It does not prevent its being useful in other connections, and you do not have to plead, a fact or a piece of documentary evidence, in every connection that you are going to use it. That was a proper stage to put it into the Bill. That is all. Now, all those circumstances—we are just on the threshold of this case—we expect to develop, but this is one step in that connection.

Mr. Kresel: I think your Honor has put your finger upon the proposition, by a single question which was brought out and which I in my imperfect

argument did not bring out. This evidences an overt act of a conspiracy, or it is a document showing the agreement or conspiracy; those are the only two elements in a conspiracy, evidence showing an agreement, and then an overt act pursuant to the agreement.

Now, they say that it is not an overt act. It certainly is not any part of an agreement.

Colonel Anderson admits that he has no right to put in here any evidence of an overt act without first proving the agreement of conspiracy.

Under certain circumstances, we recognize that the Court has the discretion to allow evidence to go in before it, that would naturally come in certainly if counsel promises to connect. And if this were the testimony of a witness who was here under subpoena, and to whom it would be a convenience to have examined and let him go, I would say that perhaps the Court would exercise that discretion. But here is a piece of evidence that cannot get away from the Government, and that does not need to be put in immediately now.

Why is it not proper that we should have that withheld until the Government has put in some evidence that there was a conspiracy. We think we are entitled to have this piece of evidence kept out for the present.

THE COURT: Colonel Anderson, I think the objection is well taken. I think, as far as the record now goes, that this evidence does not indicate that it is material with respect to the validity or the construction of the Trading with the Enemy Act; nor do I think in the matter of a conspiracy which requires a procedure in the admission of evidence all its own, that this evidence should now be admitted or introduced or accepted.

Consequently, it seems to me that the general rule that we have been following in this case should now

apply here, and the ruling should be that the objection is now sustained with leave to you to renew your offer at a subsequent stage of the case, when you have first established a *prima facie* case, the conspiracy, or when and if it shall subsequently appear that its admission would have a bearing upon the validity or the construction of the Trading with the Enemy Act.

MR. ANDERSON: If your Honor will permit me now, then, to offer the evidence, and to note an exception to your Honor's ruling, I offer it, and I will not repeat the purposes, because I have stated them.

THE COURT: That raises another question, Colonel Anderson. I do not understand that Rule 46 prevents you putting it in somewhere sometime; but I do not understand that Rule 46 deprives a Court of Law discretion as to the order in which it shall be presented.

MR. ANDERSON: Certainly not, sir.

THE COURT: Consequently, unless you will be good enough to convince me to the contrary, I am going to now rule that the order of presentation of evidence is not affected by Rule 46. I am not going to deny you the right to put that paper of record, or to put anything else in or not, but I am going to deny you that privilege now.

MR. ANDERSON: I think that is entirely with your Honor's discretion, and I will not question it, I would not question it even if I thought otherwise. I can offer it later just as well.

MR. GALLOWAY: If your Honor please, the plaintiff next offers in evidence—

THE COURT: Colonel Anderson, do you care to have that marked for identification, or does your question or statement identify it sufficiently?

MR. ANDERSON: It is Exhibit A with the bill, if your Honor please, and therefore sufficiently identified.

THE COURT: Very well.

MR. GALLOWAY: If your Honor please, the plaintiff next asks leave to offer in evidence the letter of A. Mitchell Palmer to the Honorable Thomas W. Gregory, Attorney General, dated October 31, 1918.

THE COURT: Admitted without objection.

Received in evidence and marked "Plaintiff's Exhibit No. 9." (*See Exhibits, Vol. I, page 54.*)

MR. GALLOWAY: I wish to read only a very short paragraph, your Honor, from that.

(Reads from Plaintiff's Exhibit No. 9.)

The plaintiff, your Honor, next offers in evidence a letter from A. Mitchell Palmer to the President of the United States, dated October 31, 1918.

MR. BOGGS: What was that date, Mr. Galloway?

MR. GALLOWAY: October 31, 1918.

MR. KRESEL: No objection, your Honor.

THE COURT: Admitted without objection.

Received in evidence and marked "Plaintiff's Exhibit No. 10." (*See Exhibits, Vol. I, page 56.*)

MR. GALLOWAY: If the Court please, this is rather short and important, and I shall ask to read it, without duplication.

(Mr. Galloway reads Plaintiff's Exhibit No. 10.)

The remainder of it, your Honor, refers to the stock certificates which are in Germany and is not pertinent to this issue.

The plaintiff next offers in evidence the Executive order of December 3, 1918, which has been discussed before your Honor here—which is the Executive order appointing or attempting to appoint Mr. Polk to exercise the powers of the President.

THE COURT: Admitted without objection.

Admitted in evidence and marked "Plaintiff's Exhibit No. 11." (*See Exhibit 1 to Answer, Record, Vol. I, page 547.*)

THE COURT: That is the Exhibit No. 1 to the answer, I assume?

MR. GALLOWAY: Yes, sir. We therefore ask your Honor that this be not duplicated in the record.

THE COURT: Let Exhibit No. 1 of the answer stand for the physical exhibit.

MR. GALLOWAY: That is satisfactory.

THE COURT: Is that satisfactory, Mr. Kresel?

MR. KRESEL: Yes, sir. It will be a little confusing, because the order of the exhibits will not be consecutive. It seems to me if it be considered as marked in its consecutive order, but not to be repeated later by offering the one annexed to the answer, that will serve your purposes.

MR. GALLOWAY: Yes.

THE COURT: And in the compilation of the original exhibits, instead of spreading this at large, it shall be found as Exhibit 1 in the answer.

MR. KRESEL: Exactly.

MR. GALLOWAY: And let it stand as Exhibit No. 11 now.

MR. KRESEL: Exactly.

MR. GALLOWAY: If your Honor please, the plaintiff next offers in evidence an excerpt from the Exhibit No. 2 to the answer, which Exhibit No. 2 to the answer is an excerpt from the report of A. Mitchell Palmer as Alien Property Custodian, dated February 22, 1919. We wish to call the Court's attention especially to the part on page 70 of the answer.

MR. KRESEL: Do I understand, Mr. Galloway, that you are asking to have marked as an exhibit only a portion of Exhibit 2 annexed to the answer.

MR. GALLOWAY: We have no objection to the entire exhibit going in.

MR. KRESEL: It seems to me, your Honor, when it goes in the whole thing should go in.

THE COURT: Then let the excerpt from the report of A. Mitchell Palmer as Alien Property Custodian, dated February 22, 1919, found as Exhibit 2 in De-

fendant's Answer, be admitted as Exhibit No. 12 of the plaintiff's exhibits.

Received in evidence and marked "Plaintiff's Exhibit No. 12." (*See Exhibit 2 to Answer, Record, Vol. I, page 550.*)

MR. GALLOWAY: And we ask that it be not duplicated in the record.

MR. KRESEL: Mr. Galloway, if it would not interfere with your order of proof, would you just as leave, in order to keep the continuity of the exhibits, put in the extract from the Congressional Record of February 28, 1919, showing that the report which you have just now marked in evidence was sent by the President to Congress?

MR. GALLOWAY: I have no objection to that, but I do not happen to have a copy of it for the Court at this time.

MR. KRESEL: I have one I think.

MR. GALLOWAY: We also ask, in that event, your Honor, to put into the record the letter of transmittal by the Alien Property Custodian to the President, which shows that it is dated February 22nd, and that the report is made as of February 15th.

MR. KRESEL: Yes, there is no objection, your Honor. The fact is, just as Mr. Galloway stated, that the report was made as of February 15th, that the letter of transmittal to the President is dated February 22nd; but it does not, however, follow from that, that it was sent to the President on February 22nd. The fact is, as we understand it, that it was not sent until February 27th.

MR. GALLOWAY: We do not concede that fact, of course. We do not know it, your Honor.

MR. KRESEL: Yes, but I simply did not want the record to indicate that we conceded that.

THE COURT: Admitted without objection.

MR. GALLOWAY: If the Court please, I ask leave

to supply those exhibits later, as I do not have them at hand.

THE COURT: I think Mr. Kresel is going to furnish you with a copy.

MR. KRESEL: We will supply a copy.

THE COURT: Are you ready now to do it?

MR. KRESEL: Yes.

MR. GALLOWAY: The letter referred to, if the Court please, transmitting this report, the letter of the President transmitting this report, is found on page 4880 of the Congressional Record of the 65th Congress, third session, of March 1, 1919, and we ask that it be marked and introduced in evidence here.

THE COURT: But let the letter from Mr. Palmer to the President precede this.

MR. GALLOWAY: Yes, we should have that preceding this one.

MR. KRESEL: Yes.

MR. GALLOWAY: Have you a copy of that?

MR. KRESEL: Yes.

THE COURT: This will be marked 14 and the letter of Mr. Palmer will be marked 13.

MR. GALLOWAY: Yes, it should precede it. As Exhibit No. 13 we offer in evidence the letter from A. Mitchell Palmer to the President, dated February 22, 1919, which forwards a report according to the Act of Congress, and states that the report is made as of the close of business February 15, 1919.

THE COURT: Admitted without objection.

Received in evidence and marked "Plaintiff's Exhibit No. 13." (*See Exhibits, Vol. I, page 58.*)

THE COURT: The letter of the President to Congress just referred to by you, Mr. Galloway, a moment ago, is marked 14.

Received in evidence and marked "Plaintiff's Exhibit No. 14." (*See Exhibits, Vol. I, page 59.*)

MR. KRESEL: May I make another suggestion. Mr.

Galloway may follow it or not, as he deems wise. The letter to the President which has just been marked in evidence, and the President's letter to Congress, refer, of course, to the whole report. Mr. Galloway has put in as an exhibit only a portion of the report, namely that portion which we annex as an exhibit to our Answer. Would it not be just as well that the entire report be considered in evidence?

MR. GALLOWAY: No, if your Honor please, I object to the entire report going in if for no other reason than there that we do not want to put in the record.
that there is a great mass of immaterial matter in

MR. KRESEL: I withdraw the suggestion. We will put it in in our case.

MR. GALLOWAY: There is a great mass of detail and statistics there that we do not care to encumber the record with. If they want to do it, all right.

MR. KRESEL: Of course I was not going to ask that it be copied in the record. All my suggestion was going to be was that it be considered in evidence and each side might refer to such parts of it as they wished. Still, as you do not care to follow the suggestion——

MR. GALLOWAY: I do not care to follow it. We also, if your Honor please, wish to call the Court's attention to the parts of Mr. Palmer's report which are found on Pages 69 to 71 of the Answer. I wish the record to show this: Pages 69 and 71 of the Answer, and Pages 101, 102, 103 and part of 104.

MR. KRESEL: He is asking the Court to take particular notice of parts of the Answer. That I understand to be his suggestion. Of course, we have no objection to that. We would like the Court to take particular notice of the entire Answer.

THE COURT: You want that particularly examined now, Mr. Galloway?

MR. GALLOWAY: I wish to read a paragraph from Page 69.

THE COURT: You may do so.

MR. GALLOWAY: "From all the foregoing it will be seen that the all-important portion of the chemical industry, the branch in which the work of the Alien Property Custodian would necessarily be most arduous, and in which its results might be most beneficial was the dye industry. The vital character of that industry was due not to its financial importance, since the consumption of dyes in the United States at the time of the outbreak of the war did not exceed $25,000,000 a year in cost to the consuming industries, nor to the fact that these dyes were absolute essentials to industries producing perhaps $2,500,000,000 of goods annually, but most of all to the fact that the technical skill and equipment provided by a most successful dye industry furnished the means, and almost the sole means, to which every nation must look for advances in the application of chemical science to practical undertakings. No other industry offers a livelihood to any such large numbers of highly-trained scientific chemists, nor any such incentive to continuous and extended research."

I also wish to call the Court's attention to the statement on Page 70, of that, in which it says:

> "The outbreak of the war cut off the importation of dyes from Germany,"

—which is part of our theory here.

And on Page 71, where it says:

> "The largest of the existing producers"——

perhaps I will go back a little, to show the connecting link that comes in; going back again to Page 70:

> "There immediately sprang up a number of American companies, mostly small, organized to

embark in the manufacturing business. By strenuous efforts these companies contrived to avert the threatened dye famine which the curtailment of the German supply apparently rendered inevitable. Commencing with those dyes which were easiest to produce, and gradually extending to a limited number of the more essential and well-known of the non-patented colors, the production increased until at the time when I took office the requirements of the textile trade were being met and a considerable export business had sprung up. The quality of dyes produced was, except in the matter of standardization, comparable with the German dyes of similar character, but the fast alizarin and anthracene colors were not being produced, nor was synthetic indigo, the consumption of which is larger than that of any other dye. The largest of the existing producers, that is to say, Schoelkopf Aniline & Chemical Works, W. Bekers Aniline Co. and the Standard Aniline Co. of Wappingers Falls, have been combined with the aniline oil works of the Benzol Products Co. and with the appropriate portions of the business of the General Chemical Co., the Semet Solvay Co., and the Barrett Co., into a single large corporation known as the National Aniline & Chemical Co. This combination has since produced considerably more than half of the dyes consumed in America. During the same period the Dupont Co. had begun to construct an enormous plant at Deepwater, Del., established an immense laboratory employing approximately 200 chemists, and had bought the plant of the United Piece Dye Works, in which the latter company had succeeded in producing a number of the most valuable dyes applicable to silk. Among other important concerns the Dow Chemical Co., Messrs. Ault & Wiborg, the Sherwin-Williams Co., and the Newport Chemical Works were preparing for the production of colors on a large scale, while many other companies were turning out appreciable quantities. The prices of course rose enormously and the results for a time were correspondingly profitable."

I also wish to call the Court's attention to the paragraph on Page 72, where it is stated:

> "At the time when I took office, therefore, the American dye industry was active and profitable and in almost undisturbed possession of the field; but it required only the slightest investigation to show that the new-born industry's hold on life was of the most insecure description."

MR. KRESEL: Mr. Galloway, would you mind if I read one sentence of the same paragraph that you were just reading from? I think the Court would like to hear that in the same connection.

MR. GALLOWAY: What page are you referring to?

MR. KRESEL: Page 72, where it says:

> "but it required only the slightest investigation to show that the new-born industry's hold on life was of the most insecure description."

Later on, in the same paragraph, it is stated:

> "In the case of all the faster dyes Germany's patents had prevented every attempt at American production, and while the Trading with the Enemy Act authorized issuance of licenses under these patents, the terms were such that no licensee could hope to continue the manufacture in competition with the Germans after the war."

MR. GALLOWAY: All right. It is now in the record anyhow. We have no objection to its being called to your Honor's attention at this time.

I wish to call the Court's attention and to read certain extracts from Page 100 of that report:

> "The amendment of November 4 to the Trading with the Enemy Act presented for the first time an opportunity for what appears to me to be the most important piece of constructive work which has been possible in my department. Until the enactment of this amendment it had not

been possible to take over German patents. These patents, as had been already indicated, formed a colossal obstacle to the development of the American dyestuff industry. Evidently they had not been taken out with any intention of manufacturing in this country or from any fear of American manufacture, which the Germans apparently thought could not be successfully carried on under conditions prevailing in this country in regard to costs and to the supply of technicians and skilled labor. Upon consideration, however, it seemed that these patents offered a possible solution for the problem, hitherto unsolvable, of protecting the new American dye industry against German competition after the war."

"If they were not taken out in order to prevent American competition, they must have been obtained as a weapon against competing imports. If they were sufficient to stop importation of competing Swiss, French, and English dyes, they would presumably serve, in American hands, to stop the importation of German dyes. This was particularly probable in the case of the product patents, since most of the coal-tar dyestuffs are definite chemical combinations to which a product patent is entirely applicable.

"The idea was accordingly conceived that if the German chemical patents could be placed in the hands of any American institution strong enough to protect them, a real obstacle might be opposed to German importation after the war, and at the same time the American industry might be freed from the prohibition enforced by the patents against the manufacture of the most valuable dyestuffs. Accordingly, these considerations were laid before various associations of chemical manufacturers, notably the Dye Institute and the American Manufacturing Chemists' Association. The suggestion was met with an instantaneous and enthusiastic approval, and as a result a corporation has been organized to be known as the Chemical Foundation (Inc.), in which practically every important American manufacturer will be a stockholder, the purpose of which is to acquire

by purchase these German patents and to hold them as a trustee for American industry, 'for the Americanization of such institutions as may be affected thereby, for the exclusion or elimination of alien interests hostile or detrimental to the said industries and for the advancement of chemical and allied science and industry in the United States.' The voting stock is to be placed in a voting trust of which the trustees are to be the five gentlemen who for months have been acting as the sales committee which passes upon sales made by my department, that is to say, George L. Ingraham (former presiding justice of the Appellate Division, First Department, New York Supreme Court); Otto T. Bannard (president, New York Trust Co.); Cleveland H. Dodge; B. Howell Griswold, Jr. (senior partner of Brown Bros., bankers, Philadelphia); Ralph Stone (president, Detroit Trust Co.), and the charter is so framed that under the patents non-exclusive licenses only can be granted on equal terms to all proper applicants, and must be granted to the United States free of cost. The company is capitalized at $500,000, of which $400,000 is to be 6 per cent cumulative preferred stock and $100,000 common stock, also limited to 6 per cent dividends. The first president of the Chemical Foundation (Inc.) will be Francis P. Garvan, of the New York bar, to whose clear vision and indefatigable industry I am chiefly indebted in the working out of this plan. By Executive order obtained under the provisions of the act, I have sold to this company for the sum of $250,000 approximately 4,500 patents, the remaining $250,000 has been provided for working capital so that the company may be able to commence immediately and prosecute with the utmost vigor infringement proceedings whenever the first German attempt shall hereafter be made to import into this country. The charter of the corporation provides that surplus income is to be used for the retirement of the preferred stock and thereafter for the advancement of chemical and allied science and industry. The price thus

paid was necessarily determined somewhat arbitrarily; the great majority of the patents were presumably valueless. The value of the remainder was entirely problematical and impossible to estimate. Substantially the entire industry having combined for the purpose of this purchase, it would have been impossible on public sale to find as a bidder any legitimate manufacturer. No other bidder could, therefore, have been found on public sale except some speculative individual who might have bought them for purposes practically amounting to commercial blackmail. The combination was not objectionable to public policy since it was so organized that any genuine American, whether a stockholder of the company or not, could secure the benefits of the patents on fair and equal terms.

"It is submitted that the organization of this institution constitutes the most important step that has been taken for the protection of the new industry. Tariff protection has proved utterly unavailing in the past. The German industry as hitherto organized, and still more as now organized, has had so much to gain by extending its foreign trade and by destroying the industry in other countries that it would undoubtedly give away its goods in this country for nothing in order to recover the American market. The Chemical Foundation, however, should prove a power sufficient to discourage in a most effective manner any German attempts in this direction. If, as their newspapers boast, the Germans have during the war worked out entirely new dyes superior to their past productions, the protection afforded by it will be invaluable. It has been the uniform experience of the industry that the introduction of new classes of dyestuffs follows only several years after the patenting of the original inventions on which their manufacture depends. Accordingly, the later dyes of today depend largely upon the patents of three or four years ago. The patents transferred to the Chemical Foundation include many German patents of 1917, and even of

1918, and also many applications still pending. These patents undoubtedly include the results of the research upon which must be based the manufacture of any new dyes which the Germans are now able to produce and market. Accordingly, at the very least, the institution will be able to protect the American industry for a considerable period, and this should be all it needs. It appears to be the universal view of the more competent manufacturers in this country that, given five years of freedom from German competition, the American industry can hold its own. Probably only a measure such as the embargo which appears to have been imposed by the British and French against all foreign dye importations can furnish this protection to the degree necessary to insure the safety of the American industry; but short of such an embargo, the Chemical Foundation would seem to furnish all the aid that possibly can be given.

"At the same time the new institution promises an incalculable benefit not only to the dye and chemical industries, but to the whole American manufacturing world. The opportunities which it can offer and the rewards which it can hold out to competent research scientists should far exceed those of any institution unconnected with industry, and it may well, therefore, form the nucleus of the greatest research organization in the country."

Mr. Galloway: If the Court please, I wish to read two short paragraphs from this answer on Page 110:

"As a further step toward the Americanization of industries in the United States, the Alien Property Custodian is now engaged in collaborating with representative bodies in the dye and chemical industries in an effort to relieve these industries in the United States from the burden of German patent monopoly. Further details of the incorporation and purposes of The Chemical Foundation, Inc., through which the plan will be

worked out, are shown in another part of this report.

"It is hoped that other industries which may be injuriously affected by enemy-owned patent monopolies in the same manner as the dye and chemical industries will endeavor to take similar action, and in this way assist in the Americanization of their industries and their relief from enemy-owned patent monopoly."

If the Court please, the plaintiff next offers in evidence the constitution of the American Dyes Institute. By the way, we have only a galley sheet, and if you can supply it in more convenient form, Mr. Kresel, I would appreciate it. I think a more convenient form would be better to put in the record. I ask that this be marked.

MR. KRESEL: Just a minute, Mr. Galloway. We object to the introduction of this instrument. Your Honor has in mind what it purports to be, according to Mr. Galloway. It is a galley proof of the constitution and by-laws of the American Dyes Institute, is that it?

MR. GALLOWAY: Yes.

MR. KRESEL: We have not asked the Government to indicate the purpose for which it is offered, but it must be quite apparent that it is being offered upon the question of conspiracy. Am I right, Mr. Galloway?

MR. GALLOWAY: It is being offered, if the Court please, on the question of the allegation in the Bill that certain persons in the industry planned and agreed and schemed to get the patents which were finally transferred to the Chemical Foundation.

MR. KRESEL: I used the more descriptive word. It is a charge of conspiracy. The position we take as to this instrument is the position that we took with respect to the instrument that your Honor already

ruled on, namely the testimony of Mr. Bradley before the Congressional Committee; that it is unfair and improper to permit such fragmentary evidence in support of an allegation of conspiracy until the Government has introduced at least a *prima facie* case of conspiracy.

Moreover, we urge the additional objection that the constitution and by-laws of the American Dyes Institute can in no way be binding upon this defendant, unless the Government shows that we had some connection with the drafting of the instrument or that we had some connection with the American Dyes Institute. For both of those reasons, we object to the introduction of this evidence.

Mr. Anderson: If your Honor please, to relieve Mr. Galloway of the entire burden, I will just simply say that the Bill in this case charges that these gentlemen connected with this industry were engaged in two things:

One, a conspiracy to obtain control, so-called, of these patents; that as a part of the purpose in obtaining control of the patents was the illegal purpose of perfecting and developing a monopoly, or restraint of trade—call it that if you choose—in the United States.

This evidence is admissible on either of those questions, as showing a combination and agreement among these people, having for its purpose the things charged in the Bill. We are going to offer later the entire minutes of the Dyestuffs Institute, the records of the Dyes Institute and the manufacturing association, showing that they came together in combination and appointed a committee for the purpose of going to Washington to secure the control of these patents and worked out a scheme to do it.

The Court: What are the prayers of your Bill?

Mr. Anderson: The prayers of the Bill are for

setting aside this sale, for an accounting, an injunction, and for general relief in substance.

But as a ground for setting aside this sale, if it appears this sale was induced by legal or actual fraud, by conspiracy to obtain property of the United States for private purposes for an inadequate consideration, or that they were induced as a part of the general scheme to create a monopoly in the United States, then that affects the sale as going presumably to the intent of the Alien Property Custodian—not that he was guilty of those acts, but that he was induced to do these things which, if he had known about, these things would not have been done.

All of that conspiracy charge and the purpose of creating a monopoly has two aspects. One is the aspect of having induced this sale, of having brought it about for an illegal consideration; and certainly, it has the aspect of having brought it about as a part and for the purpose of achieving the end which was illegal in the United States. The Government has the right to prove either of those facts by any testimony that it can produce; and they all enter into the facts and circumstances surrounding this transaction, which is covered with a good deal of difficulty.

It seems to me an essential either that the entire question of so-called conspiracy, combination, inducement by fraud, whether legal or actual, contained in the Bill must be entirely stricken out, and we will meet that question right now, or this evidence—except that I do think that it probably might lead to another trial, which everybody wants to avoid—must be admitted if these allegations of the Bill are to stand.

The Court: Before you reply, Mr. Kresel, may I ask you to address yourself to this point for a moment sometime during your reply; and that is, at the moment it seems to me that the evidence now offered is not of the same character as that rejected a few

moments ago. It seems to me that this is not evidence of the overt act. I am not passing upon the point now. It would seem to me if it has any value, it tends to show the agreement of conspiracy or the conspiracy, rather than an overt act under that agreement.

MR. ANDERSON: May I add just one sentence with Mr. Kresel's permission. I want to read, your Honor, of course not in evidence, but that you may consider it——

MR. KRESEL: I have no objection.

MR. ANDERSON: The first paragraph, Article I, of the Constitution, that the name shall be American Dyes Institute.

> "Article II. • • • A. To promote and encourage the manufacture and use of American dyes; to co-operate with Congress, the Tariff Commission, the Federal Trade Commission and all governmental agencies to secure protection against unfair competitive methods by foreign producers, who at the conclusion of the war may seek to destroy a new and necessary industry and to again monopolize the American market, not only in dyestuffs but in chemicals essential to national protection."

In other words, in no way questioning their belief that they were doing a good thing for the trade, they stated there what happened——

THE COURT: I can not help wondering, Colonel, if your conclusion follows on that—and I am not passing on it—just where we would be permitted to stop.

MR. ANDERSON: It is a broad inquiry, but we are going to narrow it as much as we can, and I think we will narrow it.

MR. KRESEL: Of course, your Honor, we do not contend that the Government is not permitted to undertake to prove the allegations of conspiracy and

monopoly that are contained in the Bill, but what we do contend is that there should be applied to that part of the trial of this case as nearly as possible the rules of evidence which will not only afford the legal protection to this defendant—which, by the way, is not charged to be a member of the conspiracy—but also that it should be done in a way that will be fair to the people whose names have been mentioned as conspirators and who are not parties to the litigation.

In other words, we ask the Court to so far enforce the ordinary rule of the admissibility of evidence upon a charge of conspiracy, which is that there must first be shown a *prima facie* case of conspiracy before any overt acts are permitted to be proved, but that that rule should be so far applied here as to protect the corporations and individuals whose names are mentioned as conspirators.

Of course, if this is proof of the agreement of conspiracy, it would come clearly within the rule that I have contended for. And if your Honor by taking this instrument can say that it is any proof of an agreement of conspiracy, of course my objection is untenable. Or if counsel will point out to your Honor anything in that instrument which could be made the basis of a claim that it is evidence of an agreement or conspiracy, my objection can not stand.

What counsel has just read, namely, the purposes of this Institute, certainly do not show that they were entering into or contemplating entering into a conspiracy. They say that they were organizing themselves into an institute for the protection of their industry, for the protection of their industry against foreign competition. What right has any one to say that because that was the purpose of the organization, that is evidence that they were entering into a conspiracy to maintain a monopoly and to commit a fraud upon the

Government by taking these patents without adequate consideration.

It is just as your Honor has said, where are we going to stop? Colonel Anderson tells us that he proposes to put in all the minutes of this Institute. How are we bound by all the minutes of this Institute? When they are offered, of course we shall make such objection as we deem we are entitled to make. But here is a galley proof of the constitution and by-laws of an Institute, and if the Government can not point out any more than they have already pointed out, as to how that shows that an agreement of conspiracy was being entered into or contemplated, we say it is no evidence of any such thing, and, being no evidence, it is not admissible at this time or at any other time—certainly not at this time—until there is some proof of a conspiracy.

THE COURT: You have made your position clear for the record, haven't you, Colonel—so far as the record is concerned?

MR. ANDERSON: Yes, so far as necessary.

THE COURT: I understand you to offer this not as an overt act in carrying out the conspiracy, but as evidence, which, from your point of view, has some value as tending to establish the alleged conspiracy.

MR. ANDERSON: That is what it is for.

THE COURT: On that ground it seems to me that this evidence now offered comes within the general rule which is laid down for the general guidance of the evidence in this case, and, Mr. Kresel, it seems to me that the test of your objection possibly may come after Colonel Anderson has offered all the evidence which he deems relevant or material to establish his allegation of conspiracy, and when he thereunder offers evidence of an overt act, it is then, I take it, that I will be in a position to pass upon the admissibility of any evidence of an overt act, and it will then be for me to

determine, *prima facie* at least, as to whether or not there is any evidence in the record sufficient to establish the conspiracy. Consequently, I overrule the objection and allow you an exception.

MR. KRESEL: Yes, sir. May I now make the suggestion to counsel for the Government, as to whether it is necessary to put in this whole constitution and by-laws. Is there not some particular part of it that you want to use—so that we do not encumber the record with the whole of it.

MR. ANDERSON: I think it is all necessary. Yes, I think it is necessary both in the spirit of fairness and necessary to prove the case.

MR. GALLOWAY: This is the original I have here.

MR. KRESEL: While the Clerk is marking the exhibit, Mr. Hershkopf suggests to me that I bring this question to your Honor's consideration, because I think it is very relevant: Here your Honor is permitting a large mass of evidence to go into the record. Of course, Colonel Anderson has all the time until he closes his case within which to put in any part he wishes. We recognize that to be his right. Ought there not to be some understanding that the defendant may have some definite time after the close of the taking of evidence within which to move to strike any part of it?

In other words we do not want to be foreclosed from the opportunity of moving to strike any part of the evidence the minute the taking of evidence is closed. We shall all have a great deal to do while the trial is in progress, and my suggestion is that your Honor grant to the defendant now say five days after the closing of the testimony within which to file with your Honor and serve upon the other side a motion to strike any part of the evidence.

THE COURT: Unless the counsel for the Government has some objection to make, I am inclined to be

even more liberal than you suggest, and that is, allow each side that privilege on the day of argument and up to and including the day of argument——

MR. ANDERSON: And in addition—was your Honor through?

THE COURT: With the additional reservation and condition that if there be any portion of it stricken out at that time, which is more or less technical and which can be remedied, that I would then permit you to correct it in so far as you can.

MR. ANDERSON: I was going to make that suggestion. I beg your pardon for interrupting you.

MR. KRESEL: I thank your Honor. That is a very liberal ruling.

Received in evidence and marked "Plaintiff's Exhibit No. 15." (*See Exhibits, Vol. I, page 60.*)

MR. GALLOWAY: If the Court please, I wish to read, and ask that it not be reproduced in the transcript, certain portions of this. I shall be as brief as I possibly can.

THE COURT: The minutes have been admitted?

MR. GALLOWAY: Just the Constitution.

THE COURT: You are reading from what?

MR. GALLOWAY: The Constitution.

THE COURT: Very well.

(Mr. Galloway reads from Plaintiff's Exhibit No. 15.)

MR. GALLOWAY: I do not care to read any further.

MR. KRESEL: I was going to suggest to your Honor that we do not need the reading at this time as to whether this was an open price association or no. The defendant is not being tried for that now. It seems to me it is a waste of time.

THE COURT: I shall have to let counsel for each side determine that——

MR. KRESEL: There ought to be some limits, your Honor.

THE COURT: I think I shall have to let counsel for each side determine that at least for the present. I should like to have you point out to me some time—I do not want you to stop and do it now—what difference would it make if in the determination of the Alien Property Custodian, or the President for that matter, in the Americanization of the dyes industry, and in the determination of a monopoly according to the Sherman Law, if a person or the organization to whom is turned over the patents or to which the patents were sold was a complete American or not? I, for the moment am having difficulty in determining how that could be relevant, because the Alien Property Custodian, while the President was in Europe, might well say that is all right, we will Americanize the industry, and then take care of the monopoly under the Sherman and Clayton Acts.

I do not care to have you answer that now, because you might probably get into one of your basic discussions; but I shall be very glad to have you help me on that from time to time as you go on.

MR. GALLOWAY: We shall do that, your Honor.

The plaintiff next offers in evidence excerpts from the speech by Mr. Francis P. Garvan, which was published in a booklet, "The Chemical Foundation," and is also made a part of defendant's answer, as Exhibit No. 6.

THE COURT: No. 6.

MR. GALLOWAY: Exhibit No. 6 in the answer. We ask that the same be not duplicated in the record.

THE COURT: Let it be admitted without objection as Plaintiff's Exhibit No. 16.

MR. ANDERSON: May I make this suggestion, to avoid confusion: It occurs to me that the stipulation provides that all exhibits that are already introduced are introduced subject to objection to review the introduction. Therefore they are now introduced as Ex-

hibits in the Bill and Answer. If we introduce them again as Plaintiff's Exhibit so and so, or so and so, it may cause a good deal of confusion.

THE COURT: My understanding is that an exhibit in the pleadings does not become evidence until admitted.

MR. ANDERSON: I might say that the stipulation of counsel in this case was that that would be considered as if introduced, without further offer in evidence, and subject to your Honor's ruling, as if offered.

MR. KRESEL: Your Honor, that is quite true, and we recognize that. The only reason we suggest that they be marked in successive numerical order is so as to avoid confusion.

MR. ANDERSON: All right. I was trying to avoid confusion altogether.

Received in evidence and marked "Plaintiff's Ex- No. 16." (*See Exhibit 6 to Answer, Record, Vol. I, page 560.*)

MR. GALLOWAY: And I wish, if the Court pleases, to——

MR. KRESEL: What exhibit number is that?

MR. GALLOWAY: Plaintiff's Exhibit No. 16.

I wish to call your Honor's attention especially to certain portions which appear on page 131 and following, of the answer. (Reading from page 131 and so forth of answer.)

The plaintiff next offers in evidence the prospectus of The Chemical Foundation, Incorporated, as the same appears in Defendant's Exhibit 7 of the answer herein, and I ask that the same be not duplicated in the record.

THE COURT: It will be marked Plaintiff's Exhibit 17.

Received in evidence and marked "Plaintiff's Ex- Exhibit No. 17." (*See Exhibit 7 to Answer, Record, Vol. I, page 577.*)

MR. KRESEL: Which do you offer, Mr. Galloway? There are two of those.

MR. GALLOWAY: Page 136, Mr. Kresel.

If the Court please, I do not wish to bother your Honor with reading the first page. I shall begin at the bottom of page 136 and call certain portions to the attention of the Court. (Reading from Exhibit 17.)

If the Court please, the plaintiff next offers in evidence a letter dated June 14, 1918, from A. M. Patterson, President of the Textile Alliance, to Mr. Francis P. Garvan.

MR. KRESEL: Mr. Patterson is here in Court, your Honor, under subpoena by the Government; and I assume that he will be called very shortly. Wouldn't you rather withhold that, Mr. Galloway, until he is called, so that I may have an opportunity to examine him about it?

MR. GALLOWAY: I imagine you will have every opportunity after we call him.

MR. KRESEL: It seems to me, if the witness is going to be called, that correspondence by him ought to be withheld until he is called so that counsel may examine him about it.

MR. GALLOWAY: He certainly cannot testify to the contents when we have the document itself that we offer in evidence.

THE COURT: Do you question the authenticity of the document, Mr. Kresel?

MR. KRESEL: Oh, no, your Honor, we make no question about that.

MR. ANDERSON: That is covered by the stipulation.

MR. KRESEL: We do not question its authenticity.

MR. GALLOWAY: If it pleases the Court, I wish to suggest that the purpose of introducing it at this time is in a chain of two or three letters which come together here which we would like to get before the Court.

THE COURT: I do not know the contents of the letter. What is its purpose?

MR. GALLOWAY: It introduces Mr. Poucher to Mr. Garvan and states some things perhaps of interest in that connection.

THE COURT: That would come under our general working rule and you will have an opportunity to cross-examine with respect to it when Mr. Patterson is called.

MR. ANDERSON: In order that there may be no misunderstanding, in regard to Mr. Patterson, it may be that he will not be called at all. But under our stipulation admitting authenticity, we are entitled to put this evidence in as if he were called and this was produced as his evidence. As to the method of the introduction of evidence, I submit counsel must have a certain amount of discretion on that subject and I do not think counsel on the other side should undertake to tell us how to put in our evidence.

MR. KRESEL: That is farthest from my mind. I do not want to tell you how to put in your evidence. But if there is any question about Mr. Patterson's being called as a witness here, I want to urge an objection to the introduction of this letter. I would submit, with your Honor's permission—I will read the letter to your Honor—and we will take the objection to it that without an explanation of it, given by Mr. Patterson as to the purpose of the letter and what Mr. Poucher's connection was with these patents or the alleged conspiracy, it is inadmissible and incompetent and irrelevant, even though its authenticity be admitted, as we do admit it. Certainly, if it is anything at all, it is an overt act in the alleged conspiracy. So, under your Honor's ruling, it cannot be admitted at this time.

THE COURT: What have you to say, Mr. Anderson, to the last suggestion of Mr. Kresel, that, if it has any

value, it is as an overt act under a conspiracy which has not yet been established.

Mr. Anderson: If your Honor please, we are not proving overt acts of a conspiracy. You cannot prove, if I may say so, a conspiracy all at once, or to put it the other way, evidence should not be excluded in the development of the arrangement or agreement between the parties because you have not proved the acts of the conspiracy. If it is not properly connected up at the conclusion, it may be disregarded. As the Supreme Court has so often said, these facts must be proved; even any fact that has a remote bearing.

If we do not prove later that Mr. Poucher had something to do with the matters that are under investigation here, without going into the details of them, then this letter from Mr. Patterson to Mr. Garvan introducing Mr. Poucher might be immaterial because it proved nothing.

But if we do show that Mr. Poucher was one of the most active people in connection with this matter or who had anything to do with it, the letter is relevant, not necessarily as proof of any overt act of the conspiracy, but to prove one of the elements in the development of the purpose—we are not trying a criminal case; we are trying a civil case—which finally resulted in this arrangement that brought about the sale of these patents.

I might take a thousand acts one after another to demonstrate to the Court's mind the truth of the charge. But we would not have to prove a conspiracy before we put in evidence of those acts. If we did, we would never be able to prove a case. These acts taken together constitute evidence of the final agreement or purpose. They are each a step in the evidence. It may be that we might be unable to prove but one overt act in the conspiracy. As a matter of fact, as I take it, under the Criminal Law, you do not

even have to charge an overt act in a conspiracy. But if all of these acts are brought together, any one of which taken alone would not constitute a conclusive evidence of a conspiracy, if they satisfy a jury that an agreement was made, you can prove the agreement, because the parties to the agreement are charged with responsibility for all acts under it.

THE COURT: You do not have to prove a specific act, but what I was trying to get you to tell me, Colonel Anderson, was whether you offered this in support of your allegation of conspiracy or as evidence of an overt act.

MR. ANDERSON: Not necessarily. We offer it under the allegation of a conspiracy or scheme to get these patents.

THE COURT: Admitted under the general working rule.

Received in evidence and marked "Plaintiff's Exhibit No. 18." (*See Exhibits, Vol. I, page 68.*)

MR. GALLOWAY: We offer it in evidence and ask that it be marked. We next offer in evidence, if the Court please, a letter of the same date by Mr. A. M. Patterson to Mr. Francis P. Garvan.

THE COURT: What is the purpose?

MR. GALLOWAY: The purpose is the same as the previous letter offered, if your Honor please.

MR. KRESEL: Of course your Honor, our objections to this line of testimony are unavailable, if, upon the mere statement of counsel for the Government, that the document is being offered as evidence of the conspiracy, and not as evidence of an overt act, it is sufficient to let the evidence go in. Again, I would like your Honor to look at this document, and again I take the position that this is not, and can not be evidence of the conspiracy, but if it is anything at all, it is evidence of an overt act. (Handing paper.)

THE COURT: I would rule with more caution, Mr.

Kresel, were it not true that you will have a full opportunity to have the Court pass deliberately upon whether or not they have established a conspiracy at a later stage of the case.

MR. KRESEL: May I also urge upon your Honor this consideration, that in the admissibility of these documents written by third parties, for whom of course we are not responsible, if those documents go in evidence for the purpose of showing the truth of the statements made therein, without producing the person who wrote the document, to give us an opportunity to cross-examine, we are deprived of an essential and important right.

THE COURT: This is tried before a Court of Equity and not before a Jury, and there is no such thing, Mr. Kresel. It is admitted under the general rule.

Received in evidence and marked "Plaintiff's Exhibit No. 19." (*See Exhibits, Vol. I, page 69.*)

MR. GALLOWAY: If your Honor please, this is a letter from Mr. Patterson to Mr. Garvan, and there are only one or two pertinent paragraphs to which I would like to call your Honor's attention.

THE COURT: Have you submitted that to Mr. Kresel?

MR. GALLOWAY: This is the same letter.

THE COURT: I looked it over, and you can tell me what those paragraphs are if you will. That comes down to Mr. Kresel's last objection. What is your standpoint with respect to the value or admissibility of that letter for any purpose than to show that Mr. Patterson did give that letter of introduction, introducing Mr. Poucher? You cannot put that in to bind these defendants, as to the truth of those allegations?

MR. GALLOWAY: Absolutely not, your Honor.

MR. KRESEL: Will your Honor permit me to interrupt? I was in conference with Colonel Anderson,

and I did not hear what Mr. Galloway said. May it be read by the Stenographer?

THE COURT: He was reading the last exhibit which made certain statements of fact with reference to Mr. Patterson and I asked him whether he presses those, in view of your last objection, and he said he does not.

MR. GALLOWAY: The plaintiff next offers in evidence, if the Court please, a letter dated June 26, 1918, from Mr. M. R. Poucher to Mr. Francis P. Garvan, enclosing the letter from Mr. Patterson to Mr. Garvan, introducing Mr. Poucher, and saying that he desires to be of service to Mr. Choate and Mr. Garvan.

MR. KRESEL: I assume, your Honor, that this is being offered on the same theory as the last two preceding exhibits were.

I feel so strongly about this, your Honor, that I am afraid perhaps I have not urged the strongest consideration that can be urged against the admissibility of this evidence at this time.

The counsel for the Government will agree with me that Mr. Patterson in this respect was acting as the President of the Textile Alliance. The Textile Alliance is specifically charged in this Bill with being one of the conspirators. They are not a party to this proceeding. I do not represent them, and in so far as it reflects upon the defendant that I do represent, it may be utterly immaterial whether this evidence does or does not go in, but inasmuch as the Textile Alliance has no standing here and can not speak for itself, I simply urge upon your Honor the unfairness of it—that they ought not to be charged here with a conspiracy indirectly this way; that evidence might be introduced which might reflect upon them. If in the end no charge of conspiracy will be proved, then the only remedy that there will be left will be to move to strike out. The damage will have been done.

THE COURT: The Court of Appeals of this Circuit has held, Mr. Kresel, that evidence of a conspiracy even by the principals will be given in a criminal case in the absence of those persons to show guilt of the parties who are connected with it. It is true unless this is connected up with your client, the Chemical Foundation here, it can not have any value here nor can it at all be taken as prejudicial to the absentees because they can be produced. It is admitted under the ruling of the Court.

Received in evidence and marked "Plaintiff's Exhibit No. 20." (*See Exhibits, Vol. I, page 71.*)

MR. ANDERSON: The Government in this case does not propose to be unfair or to appear to be put in an awkward position. I wanted to talk a little further with Mr. Patterson at luncheon, for the purpose of ascertaining whether it was really necessary to put him on the stand, but I do not propose to be put in a position here that the Government wants to hold back any evidence of any kind, and I will call Mr. Patterson right now and have him identify these letters and let him go on the stand and explain his visits.

THE COURT: The authenticity is not questioned. There is nothing before the Court on that. I am going to get you to proceed.

MR. ANDERSON: I will call him later then.

THE COURT: Do not discharge him, Colonel Anderson, without the consent of the Court, so that we may first ascertain whether the other side wants him to be kept here under the subpoena; do not discharge any witnesses that have been subpoenaed without calling it to the attention of the Court.

MR. KRESEL: I am perfectly willing, if your Honor will permit it, to consent that Colonel Anderson now call Mr. Patterson.

THE COURT: That is entirely for Colonel Anderson to decide.

MR. KRESEL: I do not think it will take very long, and Mr. Patterson is a gentleman who has come here purposely—was asked by the Government to be here this morning, at this particular time.

THE COURT: It is a matter over which the Court has no control, because that is within the discretion of counsel for the Government.

MR. KRESEL: Very well.

MR. ANDERSON: Without it going on the record, I will state to Mr. Kresel that Mr. Patterson will be called during the day.

MR. GALLOWAY: This Exhibit No. 20 is dated June 26, 1918, from Mr. M. R. Poucher to Mr. Garvan. (Reads Plaintiff's Exhibit No. 20.)

The plaintiff next offers in evidence a letter dated November 18, 1918, from Mr. C. Cyril Bennett, Secretary of the American Dyestuff Manufacturers' Association, to Mr. H. E. Danner, Secretary of the National Association of Cotton Finishers, in which there is enclosed a synopsis of the plan, and which it is stated the American dye industry considers the most satisfactory way of protecting the industry.

THE COURT: For the same purpose as the preceding exhibit.

MR. GALLOWAY: For the same purpose.

MR. ANDERSON: All of this evidence has that same purpose.

THE COURT: The same objection, Mr. Kresel?

MR. KRESEL: Same objection.

THE COURT: Same ruling.

Admitted in evidence and marked "Plaintiff's Exhibit No. 21." (*See Exhibits, Vol. I, page 72.*)

MR. GALLOWAY: This letter, if your Honor please, is from C. Cyril Bennett, Secretary of American Dyestuff Manufacturers' Association, to H. E. Danner, Secretary of the National Association of Cotton Finishers. (Reads Plaintiff's Exhibit No. 21.)

The Memorandum is also attached here, and shows that it is in substance a plan proposed by the British, which is an embargo. I do not care to read that.

The plaintiff next offers in evidence——

MR. KRESEL: Before you state that, I wish to point out to the Court that this last exhibit you just put in is from the Secretary of the American Dyestuffs Manufacturers' Association, which is not mentioned in the Bill as one of the conspirators, to the Secretary of the National Association of Cotton Finishers, and that one is not mentioned in the Bill as one of the conspirators. In other words, here we have now a communication between the secretaries of two organizations who are not at all mentioned in the Bill as conspirators, put in here——

THE COURT: And who are not mentioned as "persons unknown?"

MR. KRESEL: I do not know whether they are part of the "persons unknown." We have no means of knowing.

THE COURT: I mean they are not mentioned in the Bill.

MR. KRESEL: Pardon me, your Honor?

THE COURT: They are not identified in the Bill or mentioned as persons unknown to the——

MR. KRESEL: Not as far as I know.

THE COURT: But you do know whether they are so alleged in the Bill or not.

MR. KRESEL: Here is the allegation—that the persons named and others unknown entered into a conspiracy. The allegation is this, in the eighteenth paragraph of the Bill:

> "Complainant is informed and believes and therefore avers that for several years prior to the declarations of war aforesaid various persons, firms and corporations engaged in the production, manufacture, and sale of dyes, and the ingredients

thereof, and of kindred or similar chemical materials and products, had been engaged in the formation and development of plans for the complete monopolization and control of the dyestuffs," etc.

That is the general allegation. Then they go on and say in the twentieth paragraph:

"Complainant is further informed, believes and therefore avers that by or before June, 1918, the aforesaid plans and purposes for the complete control and monopolization of said dyestuffs and chemical industry had developed to a point where the essential basic and intermediate ingredients in the manufacture of dyes * * * were controlled by a limited number of corporations."

Then there are mentioned some corporations, none of which is either of these two concerns that we have just been speaking of. Then it goes on to say:

"Further control of said industry had then been or was then being effected and accomplished through or by means of agreements between said corporations"——

meaning those that have been mentioned——

"and other persons, firms, and corporations engaged in like business in America and foreign countries, and through or by means of the trade organizations, among others the American Dyes Institute, the Chemical Manufacturers' Association of the United States, the Textile Alliance, Inc., and their affiliated organizations."

MR. ANDERSON: It will be shown that the two were then in process of merger and affiliation.

THE COURT: I beg your pardon?

MR. ANDERSON: It will be shown that the American Dyestuff Manufacturers' Association and the

Dyes Institute were then in process of negotiation for merger and were affiliated in the operation.

THE COURT: On the statement of counsel, what have you to say, Mr. Kresel?

MR. KRESEL: I have nothing to say, your Honor. Of course, if it is admissible at all, as your Honor has ruled, and if they say that they will show these two concerns were affiliated with some of those that are mentioned, I assume they have a right to put it in.

THE COURT: You may proceed, Mr. Galloway.

MR KRESEL: Mr. Galloway, have you a reply to this last exhibit you have put in?

MR. GALLOWAY: I am just reading it now. I have just reached it. The plaintiff next offers in evidence a letter from the Secretary, H. E. Danner, of the National Cotton Finishers' Association, to Mr. C. C. Bennett, Secretary of the American Dyestuffs Association, acknowledging the receipt of the above plan and commenting upon it.

THE COURT: Admitted under the same ruling.

Received in evidence and marked "Plaintiff's Exhibit No. 22." (*See Exhibits, Vol. I, page 75.*)

MR. BOGGS: What is the date of it, Mr. Galloway?

MR. GALLOWAY: Dated November 20th, 1918. (Reads Plaintiff's Exhibit No. 22.)

We next offer in evidence a letter from H. E. Danner to Frank Hemingway, Esq., member of the Executive Committee of the American Dyes Institute, dated August 1st, 1918.

MR. KRESEL: We object to this on the ground, your Honor, that it has upon its face no reference to the alleged conspiracy or to the defendant. I will submit it to your Honor in an instant. As I see it, it is a communication between some of the officers of the American Dyes Institute with reference to the appointment of a committee to urge upon the War Industries Board the importance of protecting the indus-

try. If I have not properly stated the contents of it, Mr. Galloway will correct me.

THE COURT: I will hear you if you have anything to say, Mr. Galloway, because I am not sure that I understand it and I am not sure that I understand this line of testimony. I mean to say the real purpose of the testimony offered; as was said by Colonel Anderson in opening, this is not a trial under the Sherman Act, nor do I understand at the moment that if this is a conspiracy or tends to support a conspiracy, why every Manufacurers' Association in the United States would not be subject to indictment.

MR. ANDERSON: I will just say this: We would like to ask your Honor to keep in mind the ultimate point. We will show that this combination, the dyestuffs people, the dyestuff industry, controlled 90 per cent, by their own statement, of the industry in the United States, and we are now showing the development of their agreement; that their purpose was, and one of their main purposes, to get control of these great patent interests for the purpose of protecting or as one of the elements of the protection of a monopolistic condition.

The power of preventing importations in international commerce is the same as anything else. If your Honor will permit me, we will show that it was a part of the conspiracy also to get this property for, not the public purposes now, except that the advancement of all industry is of benefit to the public, legitimate advancement—that they had an open price association, that they had all the elements of a monopolistic situation; but further, even if there is not such charge in the Bill, every word of this evidence, I submit with deference to your Honor, would be admissible on the further ground that I discussed at the time that I said I was not undertaking to prove a Sherman anti-trust case or monopoly and was not going into that

Primarily that is not the purpose, that is merely one of the incidents leading up to the question whether this was a fair sale. That is all the question is at issue here—whether it was a proper sale.

If there was an inducement to this sale which in itself was illegal, if this sale was brought about by a conspiracy to obtain property which primarily belonged to the Government of the United States for a nominal consideration, for the benefit of private industry, it was illegal in its very inducement. If there was a combination of bidders, a developed combination of bidders for this property, a combination and union of all the practical bidders in this country, it was illegal, and if it had applied to lands would be criminal.

Now eliminate conspiracy—and I undertook as far as I could to keep that word out, because I hate the word, to be quite frank about it—eliminate that, eliminate monopoly entirely, and every word of this evidence is admissible as showing a development preliminary to and leading up to this sale of a combination of bidders in this property, which included every practical bidder in the United States. On that ground, if there was not any other ground in the case at all, that ground itself I shall argue at the proper time should set aside this sale, and all this proof goes to establish that ground.

THE COURT: It is admitted under our general rule; but these rulings, I may repeat now, are not intended to indicate any ultimate conclusion upon the weight or relevancy of the evidence so offered, but we want one trial only in this case, and I shall let each side make its record, unless I am convinced that there is——

Received in evidence and marked "Plaintiff's Exhibit No. 23." (*See Exhibits, Vol. I, page 76.*)

MR. GALLOWAY: I will read that as follows: This is dated August 1, 1918.

MR. KRESEL: The Court has already read this.

MR. GALLOWAY: Has your Honor read this?

THE COURT: Yes.

MR. GALLOWAY: Then I shall not repeat what it contains. The next, plaintiff offers in evidence a copy of the same letter which was sent to Mr. M. R. Poucher. I do not care to refer to or read it, other than offer it here, and ask to have it marked.

THE COURT: It is admitted under like conditions.

Received in evidence and marked "Plaintiff's Exhibit No. 24." (*See Exhibits, Vol. I, page 78.*)

MR. GALLOWAY: Plaintiff next offers in evidence a letter dated August 6, 1918, from Mr. M. R. Poucher, Director of Dyestuffs Sales Department of the DuPont Company to H. E. Danner, Secretary, American Dyes Institute, and asks leave to read the same.

THE COURT: It is admitted under like conditions.

Received in evidence and marked "Plaintiff's Exhibit No. 25." (*See Exhibits, Vol. I, page 80.*)

MR. GALLOWAY: This is dated August 6, 1918, addressed to H. E. Danner (reading exhibit).

MR. KRESEL: I trust your Honor is not under the impression that the Chemical Alliance is the same as The Chemical Foundation. They are talking about an entirely different organization.

THE COURT: I understand.

MR. GALLOWAY: If the Court please, we next offer in evidence and ask leave to read minutes of the American Dyes Institute, of January 22, 1919. If the Court please, that shows the appointment of a Committee to go to Washington and consider with the Alien Property Custodian the question of the purchase of these dye patents, and we think it is very material.

MR. KRESEL: It is the Executive Committee, Mr. Galloway.

MR. GALLOWAY: Did I state otherwise? If so, I wish to be corrected if I did.

MR. KRESEL: We have no objection.

THE COURT: Admitted without objection.

Received in evidence and marked "Plaintiff's Exhibit No. 26." (*See Exhibits, Vol. I, page 81.*)

(Mr. Galloway reads from Plaintiff's Exhibit No. 26.)

THE COURT: If I understand you, Mr. Galloway, all these documents are presented in evidence by you to show that the moving impulse of all these parties was greed and not patriotism—is that the sum and substance of it?

MR. GALLOWAY: I do not know that we care to state at this time what the moving impulses of these parties were. I think that the evidence will best show.

THE COURT: As I am going along, I am trying to appraise, the best I can, the documents that you are offering in evidence.

MR. GALLOWAY: I do not know that we would care to call it greed. I would perhaps call it the advancement of their own personal business interests.

I do not know that we care to call it greed.

THE COURT: That answers that. Business interests instead of greed. "Greed" is probably an extreme word.

MR. GALLOWAY: I think so. We do not care to go to that extent at this time.

We next offer, if your Honor pleases, a letter by Mr. H. E. Danner, Secretary of the American Dyes Institute, to Mr. W. H. Cottingham, President of the American Dyes Institute, dated January 25, 1919, in which he transmits a copy of the minutes which we have just introduced, and comments some upon those.

THE COURT: Admitted under like conditions.

Received in evidence and marked "Plaintiff's Exhibit No. 27." (*See Exhibits, Vol. I, page 84.*)

(Mr. Galloway reads from Plaintiff's Exhibit No. 27.)

Plaintiff now offers in evidence, if your Honor please, a transcript of minutes of a conference held in Washington on January 27, 1919, by a committee of the American Dyes Institute, consisting of M. R. Poucher, Chairman; Henry Wigglesworth, August Herz, R. C. Jeffcott, B. C. Hesse, F. E. Barrows, representing the National Aniline; C. Protto and Judge Laffey, representing E. I. duPont, and certain representatives of the Alien Property Custodian, as follows:

Mansfield Ferry, F. J. Horne, W. T. Gordon, Joseph H. Choate, Jr., and Ramsay Hoguet.

THE COURT: Admitted under like conditions.

Received in evidence and marked "Plaintiff's Exhibit No. 28." (*See Exhibits, Vol. I, page 85.*)

MR. GALLOWAY: I have read the title page, your Honor, before; so I shall not repeat it. That states who was present and those in attendance.

MR. KRESEL: It is quite a long statement. Do you intend to read it all?

MR. GALLOWAY: I do, because practically every word of it is material. We shall try to eliminate any of it that we possibly can. I hate to take the time of the Court, but I shall have to ask your indulgence.

THE COURT: We will take a recess today at 11:30 standard time, instead of 11:45, and we will not take the usual short recess.

MR. GALLOWAY: This is in dialogue form, and I shall read the names as they speak. (Reading from Plaintiff's Exhibit No. 28.)

I think I can perhaps omit something there, which I shall do. (Reading further from Plaintiff's Exhibit No. 28.)

I hope I can omit some more, your Honor, that I do not think is especially interesting.

THE COURT: It is about time for recess. Will you look that over during recess and probably you can arrange to abbreviate it somehow.

MR. ANDERSON: Before your Honor leaves the bench I want to say, as a matter of personal privilege, in one aspect, that I have been struck with the facility and efficiency of the stenographic reports which have been taking place. But I have had my universal experience, being a very rapid speaker, and probably not always a clear speaker, of being quite erroneously reported in many instances here. For instance, I am quoted as saying that the President was "biased." I said "badly advised." Indeed, the two could be easily mistaken in sound.

I only want to say for the record that if this opening statement and argument are going to be considered, there are a great many vital errors in the statement. If it is not going to be made a part of the record, of course, I do not want to go to the trouble.

THE COURT: I think it should be part of the record here and above, because, without that, the Appellate Court does not get the viewpoint with which we approach the case here. Then, again, there is the statement that I made yesterday that a general objection, which may have for its basis the entire argument, or anything mentioned in the argument, may be made, to save time and to expedite the case. Consequently, it seems to me that, without changing the points or increasing the argument, either side ought to be allowed to correct prior to printing the original record.

MR. KRESEL: Perhaps I might make this suggestion, your Honor; that within the time your Honor gave each side to move to strike out parts of the testimony, each side may suggest to the other corrections in the record either in argument or in testimony,

because there are bound to be some errors made by the stenographer.

THE COURT: Of course, changes in the testimony are a matter of more importance; and unless it is a plain stenographic error, it ought not to be changed.

So far as the argument is concerned, I see no reason why counsel on either side may not correct errors of diction or faulty phraseology, which might happen more frequently in my case than in yours; so that I see no reason to limit you except in substance on your arguments. But unless counsel can agree as to corrections with respect to testimony, then it will have to be determined in some other way.

MR. ANDERSON: That is understood, sir, that until the trial is finished I cannot go over all this matter; but I noticed this morning a great many statements which were not quite natural to me, as a stenographer myself, and the sound of my voice does not always carry well. I am not criticizing the reporter, but merely stating I would not like to be bound by them.

MR. KRESEL: We noticed similar examples, for instance, in Mr. Guthrie's argument yesterday. That is unavoidable, of course.

THE COURT: Undoubtedly, that is true. So you may make your corrections pursuant to arrangement between counsel; and in the absence of arrangement, if you cannot agree, I will fix it up. We will adjourn to one o'clock, standard time.

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## AFTER RECESS

MR. GALLOWAY: If your Honor please, continuing reading the document which we were reading when the noon adjournment came, I will omit a paragraph or so there and continue reading as follows: (Continues reading exhibit.)

MR. KRESEL: It is apparent, your Honor, that there are some differences between the copy from which Mr. Galloway was reading and the copy that we have. I simply desire it to be understood that we have the privilege of getting together to make such corrections as are necessary.

MR. ANDERSON: May it please the Court, I would ask leave to interrupt the orderly presentation of the documentary evidence to call Mr. Patterson, who is the head of the Textile Alliance, Incorporated, and is so situated that he is very anxious to leave. I think his testimony will be very short.

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## ALBERT M. PATTERSON.

ALBERT M. PATTERSON, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

MR. ANDERSON: If your Honor please, before examining this witness, in view of the statement made this morning, I think on behalf of the Government I should make a motion. At the time that the Bill was drawn in this case, as your Honor knows, under the law a person or corporation could only be sued in the district in which he or it resided, and therefore no one could be made a party defendant to this Bill who was not a resident of this district. I say that because of the criticism of counsel this morning of not making certain persons or corporations parties defendant.

At the time the Bill was drawn there was in the possession of the Government the evidence which has been introduced here this morning and other evidence of a secondary character, which it was believed was confirmed, which led us to a reasonable belief, the counsel of the Government to a reasonable belief that

the Textile Alliance was one of the organizations or corporations or associations which was active in bringing about this combination of bidders and conspiracy which is charged in the Bill.

I have not had a chance to go over the matter with Mr. Patterson, who is the president of that organization, who was then absent abroad, nor with Mr. Coudert, his counsel, until today, and after going over his correspondence, which has been very freely submitted to my inspection, I have reached the conclusion that while there were certain connections at certain stages which I am going to bring out by this witness, that there is no just ground for charging the Textile Alliance with being a member of the combination with respect to which we have been introducing proof.

In view of these circumstances and what I conceive to be the policy of the Government never to charge a wrong upon any citizen unless it has reasonable proof, which it thought it had, and if it finds it is wrong to frankly say so, as a duty to its citizens, I want to move to strike the name of the Textile Alliance from the Bill. It only appears once in the Bill. I will make that motion and then I will examine this witness afterwards.

Mr. Kresel: Of course, your Honor, there is no objection on the part of the defendant. I want to say that I am very glad that Colonel Anderson has been able to reach that conclusion.

The Court: Let the motion be granted. Colonel Anderson, in order that the Clerk's record as well as the stenographer's record may show these amendments —this is the second one—I will get you to submit and file in writing the different amendments that you have made and see fit to make.

Mr. Anderson: The former amendments have been filed.

The Court: They were filed.

MR. ANDERSON: This one I only decided on at luncheon, while going over it.

THE COURT: You can file it at your convenience *nunc pro tunc*.

MR. ANDERSON: I will file that on Saturday while the Court is in adjournment, and have an order allowing the amendments.

DIRECT EXAMINATION

By MR. ANDERSON:

Q. 1. Mr. Patterson, please state your name, residence and occupation with respect, if any, to the Textile Alliance, Incorporated.

A. My name is Albert M. Patterson. I reside at 118 East Seventy-ninth Street, New York City. I am president of the Textile Alliance. My occupation is that of woolen manufacturer.

Q. 2. How long have you been President of the Textile Alliance?

A. Since its organization in the spring of 1914.

Q. 3. State in as few words as possible, what is the Textile Alliance?

A. The Textile Alliance is a membership corporation, non-profit making, organized under the laws of the State of New York for the purpose of preventing frauds and unjust exactions and abuses in the sale of mill supplies and raw materials. It was organized by the nominees of the five principal textile associations of the United States for that purpose. Shall I state the associations?

Q. 4. You need not, no. It is immaterial.

A. (Continuing.) To which there have since been added two other textile associations the nominee of a committee of the trade which was unorganized and a nominee of the Dyes Institute.

Q. 5. Mr. Patterson, there has been introduced

in evidence here a letter dated June 14, 1918, purporting to be from yourself to Mr. Francis P. Garvan, introducing Mr. M. R. Poucher. That was a letter written by you, was it not?

A. It was.

Q. 6. You need not bother with the letter because it is in evidence. We will identify the reference as Plaintiff's Exhibit 18. There was also a letter introduced, which was Exhibit 19, I think, in which you wrote Mr. Garvan and asked him to introduce Mr. Poucher to Mr. Choate. You were in the courtroom when those letters were introduced, were you not?

A. I was what?

Q. 7. You were in the courtroom when those letters were introduced?

A. Yes, I was.

Q. 8. You heard them read?

A. I do not remember the letters by dates. I was looking to see which they were.

Q. 9. You heard those letters read?

A. Yes, sir.

Q. 10. They were, so far as you could tell, substantially in accordance with your recollection, were they not?

A. They are in accordance with my record.

Q. 11. You have copies now in your possession?

A. I have the original duplicates.

Q. 12. Mr. Patterson, state to the Court just how you came to give those letters?

A. I would like to very briefly.

Q. 13. Yes.

A. I was at that time a Government employee, being a member of the War Industries Board. I was also President of the Textile Alliance, which had an arrangement with the War Trade Board, whereby, among other things, it was obliged to give information to the War Trade Board.

The giving of that letter of introduction was one of a long series of similar acts, all in the nature of giving information and assistance in relation to any enemy property and enemy transactions to Government Departments under the circumstances which I have mentioned. The two letters which I wrote about that time to the Alien Property Custodian related to such information. The former letter—I think the date was May 10th—related to some information which I secured from another source and caused to be sent to the Alien Property Custodian. The letter of introduction was given in the following manner:

I was trustee for two alien property corporations; and being in the office in connection, as I recollect it, with their business or with the business of the Textile Alliance, in relation to other concerns, I met Mr. Choate and entered into conversation with him on the subject of German dyestuff corporations.

The result was that, as I recollect it, I volunteered to get him certain information relating to German patents. I then asked, according to my recollection, Mr. Poucher to furnish me with such information, and I found that a list of German patents were already in process of preparation. Mr. Poucher gave me one list which I forwarded in writing. He sent it to me by mail, and I have the letter of transmittal, stating to me that he would send me other lists later.

I went abroad for the War Industries Board early in July, and just before my departure, having been unable to arrange an interview between Mr. Poucher and any one in the Alien Property Custodian's office, and wishing to leave the matter in the hands of a man whom I had known for many years and always found to be thoroughly reliable, I wrote a letter to Mr. Garvan commending Mr. Poucher. I gave Mr. Poucher the letter of introduction, and I then went away and

heard no more of the transaction until in February, 1919, about six weeks after my return from abroad.

(No. Q. 14.)

Q. 15. Have you any letter from Mr. Poucher requesting this letter of introduction to Mr. Garvan, do you recall?

A. No; I have no letter of introduction, no letter from Mr. Poucher requesting a letter of introduction to Mr. Garvan.

Q. 16. Now, you said you came back from abroad about January, 1918?

A. My recollection is it was December 23, 1918.

Q. 17. December 23, 1918. Did you have any further correspondence with the Alien Property Custodian or with Mr. Poucher in regard to this matter subsequent to your return?

A. Yes.

Q. 18. Would you mind producing that correspondence?

A. I will produce it.

Q. 19. Let me have it, please.

A. Let me find it, if you do not mind. It begins here (indicating). There are some here (indicating).

MR. ANDERSON: If your Honor please, this is just a series of letters, and I will ask the witness to read them in series. They are very short, and I will ask him to read them into the record if counsel does not object.

MR. KRESEL: No objection.

MR. ANDERSON: I am merely asking this so that he may explain his position fully on the record.

A. On December 28, 1918, upon my return from abroad, I wrote to Mr. Poucher:

"Dear Mr. Poucher:—

"I am now back from abroad. When you are next in New York, I should be glad to see you."

On January 3rd, Mr. Poucher replied to me:

"My dear Patterson:

"I have your letter of the 28th ultimo., and am very glad to hear that you are back in the United States. We must arrange to have luncheon together; I will call you up sometime when I am in New York.

"I take it that you were abroad up to the time of the armistice; there is so much coming through that is misleading that I would be glad to get the real facts from the point of view of one who has been there and observed."

On February 6, 1919, I wrote to Mr. Poucher:

"I enclose some correspondence with your former chiefs and would like your comments thereon, as I think that considerable weight will be paid to whatever I tell the A. P. C."

I have no recollection of that correspondence, but the following reply from Mr. Poucher dated the 10th day of February, 1919, explains it:

"Dear Mr. Patterson:

"Your letter of the 6th instant. I am re-enclosing the correspondence"—

and then there is a note in my secretary's handwriting:

"Kuttroff, Pickhardt & Co., Inc."

The letter continues:

"If you will stop in to see Mr. Joseph H. Choate, Jr., at the office of the Alien Property Custodian, 42nd Street just off of 6th Avenue, I am sure he will tell you all about it.

"I would advise you to see him before you take any action in the matter."

As I say, I have no recollection whatever of that correspondence. My correspondence with the Alien Property Custodian's office, you also asked for?

Q. 20. One moment. Is that all the correspond-

ence you had with Mr. Poucher relating to the matter of the dyestuffs patents or the matters in relation to the matter?

A. No; there was one here, which I was coming to second in order.

Q. 21. All right; very good.

A. On February 28—I will read it out of order, Colonel Anderson.

Q. 22. If you will, just read it.

A. On February 28th, 1919, Mr. Poucher wrote me:

"My dear Patterson:

"I enclose copies of documents which are self-explanatory. The important thing is, I think, the point Mr. Garvan made yesterday afternoon, namely, that the dye industry in the United States is in accord with the dye industry in Great Britain on a plan of licensing imports of all Coal-tar dyestuffs, Intermediates, Pharmaceuticals, etc., for a period of at least ten years.

"The Memorandum of the 'British Scheme' is a copy of 'White Papers' given me by the British Embassy in Washington.

"I wish you would remember me kindly to Sir Richard Crawford. I hope his health has improved.

"Wishing you a good trip and above all a safe return"—and so on.

The enclosures are the following: One is headed "American Dyes Institute." "The following is a copy of resolution presented to the Office of intermediate section of the War Industries Board, at a conference in Washington, November 6, 1919."

MR. ANDERSON: Unless there is objection by counsel I will omit that. It is a long document and has no immediate bearing.

MR. KRESEL: No objection.

THE COURT: And strike out the portion that has been read?

MR. ANDERSON: No, sir. Merely to identify so as to show what he means by the correspondence.

A. (Continuing) The next is headed "Memorandum for the British Scheme for assistance to the Dye industry" and it is very long. Do you wish me to read it?

MR. ANDERSON: I do not if there is no objection on the part of counsel.

MR. KRESEL: There is none.

A. (Continuing) The next is a copy of a letter addressed to the Honorable A. Mitchell Palmer, Alien Property Custodian, dated February 7, 1919, and signed by the American Dyes Institute, the President, Secretary and counsel's signatures blank and Executive Committee signatures blank.

MR. KRESEL: That has already been read in.

MR. ANDERSON: I think that has been read into evidence already; therefore you need not read it now.

A. (Continuing) Next is a memorandum dated—

MR. ANDERSON: One minute.

MR. GALLOWAY: It has not been read yet, but I think we will refer to that later on in the presentation of this case, under the stipulation.

MR. KRESEL: I read it in my opening statement.

MR. GALLOWAY: It has not yet been read in evidence.

THE COURT: Then it need not now be read?

MR. ANDERSON: No.

A. (Continuing) The next is a memorandum dated February 7, 1919, headed "Report of Sub-Committee of the Executive Committee of American Dyes Institute" in the matter of conference with the Alien Property Custodian concerning proposal to acquire enemy-owned patents.

MR. ANDERSON: That will be introduced as documentary evidence later, and we will omit it if it is agreeable.

MR. KRESEL: That is quite agreeable.

A. That is all the correspondence I have here with Mr. Poucher. You asked for my correspondence with the Alien Property Custodian's Office.

Q. 23. Yes, on this subject.

A. On this subject, I understand.

Q. 24. I am not referring to letters that passed—

A. On February 21st, 1919—one moment——

Q. 25. Before you leave Mr. Poucher's correspondence, as I understand this document you have identified as copies of minutes of February 7th, and so forth, were transmitted to you by Mr. Poucher?

A. Simply for my information, yes.

Q. 26. Yes, I understand.

A. I am now reading the correspondence with the Alien Property Custodian's Office, subsequent to my return from abroad. The first is a letter dated February 21st, 1919, addressed to "Joseph H. Choate, Jr., Esq., 110 West 48th Street, New York.

"Dear Mr. Choate:

I return herewith the proof of Mr. Palmer's report. I have read it with a great deal of interest. There has been nothing more exciting written in connection with the war to one who has been familiar with the dye-stuff industry as long as I. Incidentally it furnishes complete corroboration of everything that we contended during our fight over bribery and adulteration and I should like to see a copy of it put in the hands of every textile manufacturer in the United States.

Would it be possible to arrange also to send a few copies to London as soon as possible for the Enemy Trading Officials? I suppose they will not be ready by the 1st of March, on which date I sail."

On the 25th of February, 1919——

Q. 27. Before you introduce that, that letter you just read was in response as I take it, to a letter from Mr. Choate transmitting to you?

A. I have no letter transmitting.

Q. 28. But he did transmit to you a copy of that report?

A. I received a copy, but I have no recollection of any letter, and there was none filled in our office.

Q. 29. I see. Very good.

A. On February 25th, 1919, I wrote to Mr. Garvan, whose name my stenographer spelled "Garvin":

> "In accordance with your kind permission I explained to three of the four members of the Executive Committee of the Textile Alliance Inc., at its meeting today the purpose of the Dye Stuffs Foundation Inc., and suggested the possibility of some sort of an arrangement with the Textile Alliance Inc. Subject to the production of a satisfactory plan for the next meeting of the Executive Committee I have no doubt that the Committee will recommend to the Annual Meeting in May that the two Corporations, which appear to have a common purpose, should in some manner join their forces.
>
> I shall be glad to discuss with you immediately upon my return from abroad and before the Annual Meeting the devising of such a plan."

That was the 25th of February.

Q. 30. Did you take the matter up with your Executive Committee, Mr. Patterson?

A. It was taken up with the Executive Committee, after I left, by our Treasurer and the Executive Committee decided adversely and nothing was ever done about it whatever.

Q. 31. And that was the end of your connection with this matter?

A. That was entirely the end of my connection with that matter.

MR. ANDERSON: The witness is yours.

MR. KRESEL: Have you finished with the correspondence?

THE WITNESS: I have omitted to read you two letters, one to Mr. Choate and one to Mr. Poucher. They are identical and they are merely introductions of our Treasurer, Mr. Denton.

Q. 32. Merely introductions?

A. That is right.

Q. 33. To whom did you say they were?

A. One was addressed to Mr. Poucher, the other to Mr. Choate. Shall I read them?

Q. 34. Introduction of your Treasurer, Mr. Denton, to these gentlemen?

A. Yes, sir.

Q. 35. Unless they bear upon this matter, you need not read them?

A. They bear upon it.

Q. 36. They do?

A. Yes, sir.

Q. 37. Suppose you read them so we may have this complete?

A. (Reading).

"My dear Poucher:

"This will introduce to you Mr. W. B. Denton, of the Textile Alliance Inc. Mr. Denton is a member of the Bar who came to us during the War for the purpose of assisting in War work. His connection with the Textile Alliance as at present planned will be permanent and he has now, and will have charge of its legal matters under our general counsel, Messrs. Coudert Brothers.

"I have spoken to him about the matter which we discussed yesterday and have arranged with him that as soon as my return is known the matter shall be put before a meeting of the Board of Directors called during my absence to meet upon my arrival. This will save several weeks' time. If there are any developments in which we can assist please communicate with Mr. Denton, who will place himself entirely at your service."

Q. 38. The matter to which you refer there was the matter of some connection or relationship between the Chemical Foundation and Textile Alliance?

A. Yes, sir; my own suggestion entirely.

Q. 39. But that was disapproved by the Executive Committee and never culminated?

A. Never consummated.

MR. ANDERSON: If your Honor please, I think it is due I should say before turning the witness over for cross-examination that we called the witness because of the circumstances which I felt were enumerated in my original statement as the basis for our action in moving to strike out the name; because it is obvious that they refused to become associated with this movement, and it is due the Textile Alliance as a citizen of the United States and its officers that that fact should appear.

In turning over the witness to the other side for examination I wish to say that if the defendant takes up any matter outside the direct examination, I shall give notice now that it makes him its own witness.

MR. KRESEL: It seems to me, your Honor, that the statement just made by Colonel Anderson rather detracts from what appeared to be a voluntary and a laudable amendment of the pleading. I think that Colonel Anderson misunderstood the witness, if he understood him to say that his Executive Committee declined to go into this arrangement, and I think Colonel Anderson means this arrangement is something that could be criticized, and I shall by examination of the witness seek to develop just what it was, what the arrangement was that they contemplated, and I shall indicate, I think, by this witness, that it had absolutely nothing to do with the taking over of these patents, so that the attempt of the two organizations to get together could not possibly have been the basis of the charge that was made in the complaint.

CROSS-EXAMINATION

By MR. KRESEL:

XQ. 40. In the first place, in this letter of February 25, 1919, from you to Mr. Garvan, that you read, you speak of having explained to three or four members of your Executive Committee the purpose of the Dyestuffs Foundation, Inc. Who was the Dyestuffs Foundation, Incorporated?

A. I regret to say that I was so ignorant of your whole plan or Mr. Garvan's whole plan that I did not even know the correct name of the corporation.

XQ. 41. Then when you wrote "Dyestuffs Foundation, Inc.", you meant this corporation whose real name is The Chemical Foundation, Inc.?

A. Yes, sir.

XQ. 42. When you considered a co-operation between the Textile Alliance and the Chemical Foundation, Inc., and when you said in this letter that the two corporations which appear to have a common purpose should in some manner join their forces, what did you have reference to?

A. I had reference to the corporate objects of the Textile Alliance, which was the abuse, the correction—I am quoting from memory—of unjust and unlawful exactions, abuses and frauds in the sale of dyestuffs and mill supplies and raw materials.

XQ. 43. Did you have in mind at all anything about taking over the German patents and allowing the Chemical industry to have common use of them or anything of that sort?

A. Yes, insofar as the Chemical Foundation, through its ownership of German patents, might be in a position to combat successfully the conditions that existed before the war.

XQ. 44. In other words—and I want to make it entirely clear just for your own interest and for the organization that you represent—this was not a bid

by you to enter into a conspiracy with the Chemical Foundation for any purpose?

A. No, sir. If it is proper for me to say so, my motives were partly selfish. We had worked on this matter—I had worked continuously since 1911; and when the Textile Alliance had accumulated certain funds amounting to some twenty or $25,000, I thought it was a very convenient opportunity for me to unload my responsibilities upon Mr. Garvan and at the same time contribute to a limited extent to the finances of the new corporation.

XQ. 45. And that is what you had in mind when you made the suggestion for the co-operation between the two organizations?

A. Yes, sir; it was.

XQ. 46. You have mentioned twice now, as I recall it in your testimony, that the Textile Alliance had for one of its purposes the elimination of frauds in the textile industry and especially in dealing between mills and dyestuff manufacturers. I want to ask you, Mr. Patterson, whether prior to the organization of the Textile Alliance in 1914 you had been instrumental in running down such practices as you have described. Just say yes or no, please?

A. Yes.

Mr. Anderson: If the Court please, I do not care to argue, but I merely want to note an objection to any evidence of matters or dealings with the Germans in their so-called relationship to the industry prior to the war in the United States. I do not think it has any relation to this matter and therefore I want to note an objecion.

The Court: Your objection is not that it is not cross-examination?

Mr. Anderson: It is both. It is outside of the direct examination, but I recognize the right of counsel to make this gentleman his own witness on any matter as long as they want to do it.

MR. KRESEL: I am perfectly willing to make Mr. Patterson my witness on this branch of the case.

MR. ANDERSON: But I object. I am not going to be technical about making him your own witness, but I do object to going into matters that I think are entirely irrelevant.

THE COURT: Then you have concluded your cross-examination, Mr. Kresel, and you want to use the witness while on the stand to bring out some matters connected with your own case.

MR. KRESEL: I have not concluded my cross-examination, but if this question in Colonel Anderson's opinion will elicit anything that was not brought out on the direct examination, I am perfectly willing to abide by the rule that I am making him my witness for that purpose.

THE COURT: For this question?

MR. KRESEL: For this question and any question pursuing this particular line of inquiry. There will be very little of it.

MR. ANDERSON: I did not hear you, Mr. Kresel.

MR. KRESEL: I say that if it be your claim that this question is going to elicit anything that was not developed on the direct examination, I am perfectly willing to take Mr. Patterson as my witness.

THE COURT: I sustain the objection to the question as not being cross-examination and you may take the answer as if he were your witness, under the agreement of counsel.

MR. KRESEL: The answer had already been given. It was in the affirmative.

XQ. 47. Now, Mr. Patterson, I wish you would state whether prior to the war you were in the woolen business?

A. Yes, sir.

XQ. 48. What was the name of your concern?

A. The Waterloo Woolen Manufacturing Company.

MR. ANDERSON: As I understand, all this evidence is subject to the same objection, without renewing it each time.

THE COURT: Your objection that it is not in cross-examination is sustained; and the answer will be taken as in direct examination, by agreement of counsel. As I understand you, Colonel Anderson, you have no objection to his taking advantage of the presence of the witness on the stand to bring out any facts which he may deem relevant or proper to his side of the case.

MR. ANDERSON: Which he could bring out if he called the witness himself. I have no objection whatever. In order to save interruption, if Mr. Kresel will agree that all this testimony is admitted subject to the objection on the further ground that it is irrelevant and immaterial to the issues of his case, I will not interrupt by any further objection.

THE COURT: Then all further testimony will be considered brought out as if Mr. Patterson had been called by you, Mr. Kresel, unless you desire in the case of some specific questions to call attention to the fact that they are in cross-examination.

MR. ANDERSON: And each question and answer is considered objected to on the ground that it is immaterial and irrelevant.

THE COURT: As to that, the objection will be overruled and the answer taken under our general working rule.

MR. ANDERSON: Yes, with an exception.

XQ. 49. Had you been in the woolen business for many years prior to the outbreak of the European War?

A. Since 1896.

XQ. 50. And was your concern a large user of dyes and dyestuffs?

A. Comparatively.

XQ. 51. And did you have personal charge of buying the dyes for your company?

A. For a time.

XQ. 52. And in that way were you familiar with the dye situation here?

A. Yes, sir.

XQ. 53. Prior to 1914, did you know Mr. Poucher?

A. I knew Mr. Poucher from about 1898, as nearly as I could tell.

XQ. 54. In what connection did you meet him?

A. As a customer.

XQ. 55. You were a customer of his?

A. Yes, sir.

XQ. 56. You were purchasing dyes from him?

A. From his company.

XQ. 57. What was the name of his company?

A. It had various names at different times: Kuttroff-Pickhardt & Company; The Kuttroff-Pickhardt Company, Incorporated and I think the Badishe Company and the Continental Color & Chemical Company. But I do not pretend those names are correct.

XQ. 58. Did you understand that during your dealings with Mr. Poucher that this concern of his, whatever its name was, was representing in the United States the Badishe Company of Germany?

A. It so represented itself.

XQ. 59. And the dyes that you were buying from Mr. Poucher were German dyes?

A. Yes, sir.

XQ. 60. Is it the fact, Mr. Patterson, that prior to 1914, most dyes used in the United States did come from Germany?

A. Yes, sir.

XQ. 61. Was there any dye manufacturing business here in the United States prior to 1914?

A. Yes, but a very small one and I did not know it personally because they made nothing suitable for our use.

XQ. 62. The activities that you speak of in which you were engaged, to correct abuses in the relations between dye sellers and the dye users in the United States; did those antedate 1914?

A. They began about 1911.

XQ. 63. And were you active in those attempts to correct those abuses?

A. Yes, sir.

XQ. 64. Was there anybody associated with you therein?

A. I was a member of a Committee of the American Association of Woolen & Worsted Manufacturers and there were two other members of that Association connected with me.

XQ. 65. Now then, prior to the incorporation of the Textile Alliance in 1914, did you three gentlemen as representing this other organization you have just mentioned conduct this investigation into the abuses that you speak of?

A. Yes, sir.

XQ. 66. As a result of your activities and those of your two associates whom you have mentioned, did you make a report concerning what you found to have been the condition in the dye industry?

A. Yes, sir.

XQ. 67. Is this a copy of that report and does it contain to your knowledge a correct statement of the situation that was developed by your investigation (handing a pamphlet to witness)?

A. I was not personally familiar with the—

MR. ANDERSON: I would object further to that testimony because it is not an official report of the Government or anything of that kind and it is not proof of the facts which it contains. Unless they are within

the knowledge of this witness—and if they are within the knowledge of this witness, he can testify to it now and not put in the written report—

THE COURT: I think that is true. Your objection will have to be sustained. Have you had an opportunity to see this report?

MR. ANDERSON: No, sir.

THE COURT: The only thought that I have is as to whether that is a brief statement which he would here repeat if necessary. It will not go in in this way, over your objection. If you want to examine this document now, Colonel Anderson, you may do so.

MR. ANDERSON: Will your Honor allow us a few moments to look it over to see if we can get by it.

MR. KRESEL: I think it would shorten it really if we were allowed to do this.

THE COURT: If your objection is pressed, we will not take it in this form. Do you want a recess in order to examine it?

MR. ANDERSON: If your Honor please, in order to save time, Mr. Patterson wants to get away, and I will ask, if counsel agree, that they go ahead and put the report in as the answer of the witness with leave on my part to move to strike it out, if I so decide, after examining it this afternoon. He says if I insist upon that motion—and I shall not, if I believe it to be fairly stated—that he will either prove it by someone else or recall Mr. Patterson at a later date.

THE COURT: That should be with the further reservation to you, Colonel Anderson, that if after examining the report you find that there are matters there as to which you would desire to cross-examine—

MR. KRESEL: Then we will produce Mr. Patterson.

THE COURT: Mr. Patterson will be available for further cross-examination.

MR. ANDERSON: Of course, this is also subject to

my general objection as to each question on the ground that this is irrelevant and immaterial.

THE COURT: I understand there is no testimony that can be offered by the defendant except as to the value of patents.

MR. KRESEL: Will you mark that. How do you run the defendant's exhibits, by initials?

THE COURT: The same way. Defendant's Exhibit 1. You have no objection, Colonel Anderson, to it being admitted out of order?

MR. ANDERSON: I will not make any point of that. It can be admitted out of order. The only question is that I would like to be sure there is nothing prejudicial.

Received in evidence and marked "Defendant's Exhibit No. 1."

XQ. 68. This report which is now marked Defendant's Exhibit 1, is that a correct resume of what was developed in your investigation?

A. Yes, sir; but I should like to say that I was not personally familiar with every fact contained in it.

XQ. 69. Certainly not.

A. But I relied largely on the statements of the counsel in the cases.

MR. ANDERSON: I should then have to make a further objection to it as hearsay, your Honor.

THE COURT: Then what have you to say as to the granting or denial of Col. Anderson's motion to strike out?

MR. KRESEL: I have this to say, your Honor—that if Colonel Anderson insists upon his motion I shall ask the witness to detail what he knows of his own personal knowledge, and I wanted to avoid that in view of the lateness of the hour.

THE COURT: I do not see how you can, in view of the witness's last answer, which was full and frank, that only certain facts therein contained he knows of

his knowledge; so that I shall have to grant the motion to strike out.

MR. KRESEL: Very well, then. The Clerk will note that that exhibit, then, is out of the case.

THE COURT: That is stricken out. You may, if you desire, have him state what there is in there of his own knowledge by a reference to paragraphs of that, if that will save you time.

XQ. 70. Do you think you can do that, Mr. Patterson?

MR. ANDERSON: If your Honor please, I am anxious to save time. I will let the paper go in and—well, I cannot.

THE COURT: No, you cannot.

MR. ANDERSON: If it is necessary. I do not suppose it could be done.

THE COURT: No, because, you see, when I come to consider that I have to give it full weight or no weight. Then if I deem it material in considering it I won't know whether this is in evidence or not.

MR. ANDERSON: I think you Honor is quite right.

XQ. 71. Mr. Patterson, did you give a copy of this report to Mr. Garvan at about the time when you first came in contact with him?

A. I think so, but I am not certain.

XQ. 72. Well, is it your best recollection that you did?

A. Yes, sir.

MR. KRESEL: Then, if your Honor please, upon that ground I shall—

THE COURT: He does not say that he did. If he said that he did, that would be one thing; but he has not said so.

XQ. 73. Mr. Patterson, I am afraid that we cannot get this in, in view of your answers. Just please state what you knew of your own knowledge of the conditions and what the investigation developed, and

what action was taken thereon. Now, please do it as briefly as possible, stating what you knew.

A. The conditions that I knew of my own knowledge—may I use the report, your Honor?

By The Court:

Q. 74. To refresh your recollection?

A. Yes.

Q. 75. Yes.

A. In the case of one Max Leithold, I knew of my own knowledge the details of that case, which were in brief that he was practically put out of business through alleged bribery on the part of a certain salesman employed by Philadelphia dyestuff houses, and the reason that I knew it was that the salesman admitted it in my presence; and in the case of John and James Dobson I was familiar personally with their claims and was familiar with them, because one of the Messrs. Dobson and one of his superintendents made their first statement on which the suit was instituted to me as a member of that Committee. I was familiar with the fact that one suit brought by the Dobsons against Mr. Metz's then firm, whose corporate name at this moment escapes me, was settled for the sum of $40,000.

By Mr. Kresel:

XQ. 76. You speak of these suits. You have not yet explained the basis of them.

A. The basis of the suits so far as—

Mr. Anderson: If your Honor please, I do not want to be technical, I hate to be; but there is nothing that this gentleman has testified to that is evidence.

Mr. Kresel: Is what?

Mr. Anderson: It does not appear that the people who said these things, where he was, had authority to bind anybody or to speak for anybody. He cannot speak of what the basis of a suit was except by the

production of the pleadings. He may have been told these things; he naturally could not know them. He believes them—I do not question that; but as evidence, if we go into proof of matters of this kind we go into the trial of all those suits over again, as to what they were about. In addition to the materiality and relevancy, I respectfully submit that I am compelled if for no other reason than to keep the record within reasonable limits, if we are going to apply this evidence to matters which only can be within his personal knowledge and as to which he can testifiy without hearsay, I move to strike out his answer thus far, and each paragraph thereof.

Mr. Kresel: As to his personal knowledge, I shall come to that in a minute. I think your Honor is entitled to know the theory upon which this evidence is being offered. Your Honor will recall that I stated in the opening statement for the defendant that one of the means whereby the Germans maintained their monopoly here was a widespread bribery system that they maintained among the manufacturers, in bribing the manufacturers to use only German dyes. It is that which I am trying to bring out through this witness; it is that that was involved in these suits. Of course, we are not here to try these suits, all I am trying to establish is the fact. This witness says that he knows of his own knowledge what the facts were as to that. He himself was a user of dyes to a large extent. He came in contact with the situation. And that is all I am trying to bring out from him.

The Court: Yes, but does not the answer of the witness dispute and deny the soundness of your contention? That is, does not the witness, notwithstanding his general answer that he knows, disclose that he does not know in the sense that is required to enable him to speak as a witness? That is Colonel Anderson's objection. So far as the admission of a certain

representative of a dye industry in Philadelphia that he had been guilty of bribery is concerned, it is almost admissible as it now stands, but not quite, so that it will take other questions—I don't know whether that was the German dye industry or Japanese dye industry or American dye industry. So that as that stands it is not, as I view it, in a position to remain in the record. Now then, as to the suits, I did not get fully what the witness's answer is. I did not follow that.

MR. KRESEL: The witness had not gone far enough.

THE COURT: Will you reserve your motion, then, for a few more questions?

MR. ANDERSON: I want to make it timely, but I do not want to make it before the developments.

THE COURT: No, I meant this: Unless the connection is made which in your view is sufficient to enable it to stay of record, I will entertain your motion, but I think possibly it may be a little premature at this moment.

MR. ANDERSON: Certainly, sir.

XQ. 77. Mr. Patterson, the one instance that you spoke of where an agent of a dye concern made an admission that there had been bribery—what concern was that that you were referring to?

A. That was the Farben Fabriken of Elberfeld Company, who employed a salesman named Nathan Litchfield, who is the man who made the admission to me.

XQ. 78. The Farben Fabriken of Elberfield, was that a German dye concern?

A. It was the American house of the concern that is known as the Bayer Company.

XQ. 79. A German concern?

A. A German concern known as the Bayer Company.

XQ. You were interrupted by Colonel Anderson's

objection and you were about to state something about a suit, and I was saying to you that I wanted you simply in a general way to state the basis of the suit. I do not mean that you should tell us what was in the complaint or the answer; what was it that was involved?

A. There were many suits, there were a large number of suits, and the same principle was involved in all of the suits against the German houses.

XQ. 81. Namely?

A. Namely, the fact that they were in a combination in restraint of trade and that in pursuance of that combination they resorted to unfair trade practices.

XQ. 82. What unfair trade practices?

A. Chiefly bribery and adulteration, but there were other allegations in certain cases which did not affect all of the defendants. I suppose I might call it sabotage.

XQ. 83. Bribery of whom?

A. Bribery of the buyers' employees.

XQ. 84. Of the American users of the dyes?

A. Yes, sir, the American customers' employees.

XQ. 85. When you speak of adulteration, adulteration of what?

A. Adulteration of the dyes delivered to customers.

XQ. 86. Dyes delivered to the customers by the agents of the German concerns?

A. By the vendors.

Mr. Anderson: He is your witness, but I would rather you would let him testify—not you.

The Court: The question was leading, but his answer is made without respect to the leading question.

Mr. Anderson: I will let the answer stand, but I was merely suggesting there was a limit.

XQ. 87. It was subsequent to that investigation that the Textile Alliance was organized?

A. Yes, sir.

XQ. 88. And did I understand you to say in answer to Colonel Anderson's question that the purpose of the Textile Alliance was to root out these trade practices that you have described?

A. May I read the corporate purposes?

XQ. 89. No, just state it in a general way, if you will.

MR. ANDERSON: I would like to have him read it.

XQ. 90. Please read it.

A. (Reading) "The particular objects for which the corporation is to be formed are: The protection of mill owners and operators from and the prevention and reform of abuses, unjust and unlawful exactions, deceptions and frauds in the manufacture and sale of mill supplies, and the prevention and prosecution of unlawful, illegal and improper actions, misdemeanors and crimes in connection therewith."

XQ. 91. The membership of the Textile Alliance was made up of whom?

A. The voting membership, in which I assume you are interested—

XQ. 92. Yes.

A. (Continuing)—consisting of nominees of the principal textile associations plus the officers of the Textile Alliance itself.

XQ. 93. You said there were five such textile associations originally?

A. At that time.

XQ. 94. Was one of them the association three of whose members had had the investigation in charge before the incorporation of the Textile Alliance?

A. Yes, sir, the American Association of Woolen & Worsted Manufacturers.

XQ. 95. So that may we say that the purpose of the organization of the Textile Alliance, among other

things, was to continue the work that this committee of yours had been doing prior to the incorporation?

THE COURT: Do not answer. The question is leading. Is there an objection, Colonel Anderson? My views about leading questions are these—that they sometimes save much time, particularly where you have a credible witness on the stand who has a mind of his own. Now then, in such cases I think a leading question does no harm.

MR. ANDERSON: That is quite my view, sir. I do not object. Where the question was extremely leading if your Honor would follow the English rule and tell counsel to put it the other way, it will save me objecting. Unless I see that it is prejudicial I am not going to object to form.

THE COURT: I do not think a leading question does any harm with this witness.

MR. ANDERSON: I quite agree. I do not object, except that I would rather he confined himself to the question.

THE COURT: Read the question.

XQ. 96. (Question No. XQ. 95 repeated as recorded above.)

A. Yes, sir.

XQ. 97. You spoke of having the Textile Alliance giving information to various Governmental agencies. You mentioned the Alien Property Custodian. I think you mentioned the War Trade Board?

A. Yes, sir.

XQ. 98. Were there any other Governmental agencies to whom you gave information with reference to any property and enemy activity?

A. Yes, sir; the Department of Justice, the—well, I am under the impression the Treasury Department, but I should like to consult with my associates before I say positively.

XQ. 99. All right. Now with reference to the

Alien Property Custodian particularly, do you recall receiving a letter from them way back in November 1917?

A. November 15, 1917, signed by H. L. Garsin, Bureau of Investigation, and on an Alien Property Custodian letterhead.

XQ. 100. Would you mind reading that?

MR. KRESEL: Your Honor sees no objection to that —so we do not use it.

A. (Reading) "November 15, 1917. Textile Alliance, Inc., 45 East 17th Street, New York City.

"Dear Sirs:

"I trust that any infromation which you may now have or which may hereafter come into your possession with reference to property in this country owned by alien enemy you will advise this Department.

"For your information I am enclosing a copy of the law and would appreciate your co-operation. I understand you may have in your possession some data as to quantities of wool which were taken from interned ship in New York Harbor.

Very truly,
H. L. GARSIN,
Bureau of Investigation."

XQ. 101. And did you answer that letter?

A. We acknowledged it on November 16th and on November 27th we advised him that we handed him therewith a memorandum of shipments of wool, twine, rope and sheepskins on hand in this country owned by alien enemies, of which we have been advised.

XQ. 102. Was it in this way, that is by the opening of this correspondence, with the letter of November 15, 1917, that you have just read, that you and the Textile Alliance came into contact with the Alien Property Custodian's Office?

A. Well, I can go farther back than that. I think

that the reason Mr. Garsin wrote to us was that he was advised to do so by the Bureau of Imports of the War Trade Board, because I have been so informed by the director of that Bureau.

XQ. 103. You spoke of having been Trustee, I think you described it, of two concerns in the hands of the Alien Property Custodian.

A. Yes, sir.

XQ. 104. What were the names of those two corporations.

A. Dr. Jaeger Sanitary Underwear Company and Dresden Lace Works.

XQ. 105. That was another connection between yourself and the Alien Property Custodian's Office?

A. Yes, sir.

XQ. 106. Did you also have anything to do with the management of the Passaic Mills?

A. The War Trade Board and the Alien Property Custodian requested us to appoint a Custodian for wool stored in their possession or in process of manufacture, which we did. That is to say, we suggested him and they appointed him jointly, and when he resigned the same process was repeated with another man, and there was considerable correspondence and negotiation concerning those companies which I could not give you without reference to the file. It extended for a very protracted period.

XQ. 107. In the work that you were engaged in with reference to this German bribery, did Mr. Poucher have anything to do with that?

A. Yes, sir.

XQ. 108. Was he working with you or against you?

A. He was working with us.

XQ. 109. That is all I want to know. When you went abroad in July, 1918, and stayed abroad until the 23rd of December, 1918, during that time did you have

any communication or any connection with the Alien Property Custodian?

A. I have no record of it and no recollection of it.

XQ. 110. How did you first learn about the purpose to form or organize the Chemical Foundation?

A. I caused our files to be searched, and to the best of my recollection and from an examination of the files I believe that I first learned of it from newspaper reports on or about the 20th of February, 1919.

XQ. 111. You went abroad again at the end of February 1919, did you not?

A. The 28th of February or the 1st of March.

XQ. 112. And how long did you stay abroad then?

A. Until June.

XQ. 113. While abroad did you have anything to do, officially, I mean, with the matter of the importation of dyes or dyestuffs into the United States?

A. Yes, sir.

XQ. 114. In what connection?

A. Just after I arrived in London I was summoned to Paris by the Economic Section of the American Mission to the Peace Conference, and I remained in Paris for some six weeks as technical adviser on dyes and on textiles, in spite of my disclaimer that I was not competent to advise on dyes.

XQ. 115. That was the period during which the Peace Conference was in session abroad?

A. Yes, sir.

XQ. 116. And this conference that you speak of, the Economic Conference, was that connected with our Peace Delegation abroad?

A. I meant to describe the American Section, the Economic Section of the American Mission to the Peace Conference.

XQ. 117. Did this official Commission or Economic Section of the Commission consider and in-

quire about importations of dyes from Germany into the United States?

A. Yes, sir; it was the constant subject of discussion.

XQ. 118. And was there any plan that was being considered in that connection?

A. Well, there were several plans being considered. Of course, the principal one was that finally embodied in the Treaty of Peace itself, but there were interim plans suggested and considered for the purpose of immediate requirements of German dyes on many different schemes or plans, none of which went through, although there was finally such a purchase made by our own Government independent of any such scheme or plan.

XQ. 119. In the consideration of plans to import or to allow the importation of German dyes into the United States during that period was the question considered as to dumping?

A. Yes, sir; the Treaty was framed with reference to the protection of both consumers and manufacturers of dyes in this country, from not only dumping but from the opposite, which—I do not know exactly how to describe it, but putting on pressure by withholding supplies of necessary dyes not made in this country.

XQ. 120. Full line forcing?

MR. ANDERSON: One moment, if your Honor please, I will have to move to strike out the witness's answer. I do not think any witness can testify for what the Treaty of Versailles was framed, and I do not think it is competent for him to undertake to say the purposes of the makers of that Treaty in framing it. If they want to ask what the Treaty means, that is another question.

MR. KRESEL: I did not certainly understand that

the witness intended to be here interpreting the Treaty. My question, as your Honor will recall—

MR. ANDERSON: The purpose of the negotiation.

MR. KRESEL: I will consent to strike it out.

THE COURT: Let the answer be stricken out.

XQ. 121. Mr. Patterson, my inquiry is as to the consideration that was given by this Section with reference to the German importations of dyestuffs and what it was that was being considered in connection therewith. You spoke of dumping—now, what else?

MR. ANDERSON: May I suggest, being considered by whom?

MR. KRESEL: This Section of the Peace Commission to which he was adviser.

MR. ANDERSON: If your Honor please, we cannot go into the peace negotiations. There were I think some thousand people over there engaged in the negotiation of that Treaty on the part of the United States. To undertake to testify at this time what was being considered—what does it matter what was being considered? The whole question is what was done, and if it was done, then it becomes either binding or not binding and is the law; but if we go into the trial of the negotiations and what took place, and Mr. Patterson will testify one thing and we will call witnesses to testify another thing, we will be re-negotiating the Treaty of Peace on the records here. Certainly, in addition to my general objections, that is going further afield than any pleading, I submit.

MR. KRESEL: Colonel Anderson, that is not my purpose. I am not trying to fight out the Treaty with you.

MR. ANDERSON: I might add that it infringes upon the rights of the Senate.

MR. KRESEL: Well, Senator Lodge ought to make that objection. All I am trying to bring out from the witness is that the conditions we describe with refer-

ence to dumping and full line forcing were conditions that prevailed and were being considered at the time by this Economic Commission, when the question again arose as to the importation of dyes from Germany after the war. Now, I made that statement. If it were a different witness I would not make it, because it would show him what I wanted from him; but Mr. Patterson is not that sort of a witness. That is what I am trying to bring out, and we have a right to bring that out; because it shows a condition that prevailed here prior to the war which had an influence on the Alien Property Custodian, the President, and what they did here.

THE COURT: Isn't the difficulty with your contention and its unsoundness, if it is unsound, that the discussions in Paris pertaining to conditions, even assuming the full line forcing, dumping and other unfair methods of competition existed and were taken advantage of by the Germans to monopolize the American market for their products manufactured abroad—would the discussion of that at Paris be relevant to the issues of this case? Isn't that the fact, and whether it was discussed at Paris or not, if you show the conditions and the action of the Alien Property Custodian, and possibly the President, then you have occupied your whole field without going to Paris?

MR. KRESEL: Yes, sir. Yes, that is quite right. The only reason I was asking him about the situation in Paris was because that led me into a discussion with him or evidence from him with reference to this dumping and full line forcing. I propose to ask him then to state if he knew what the situation was with reference to that prior to the war.

THE COURT: That brings me back to Colonel Anderson's motion to strike out. My difficulties are these: So far as the admission of the German agent or the agent of the American house in the German

industry is concerned, my thought is that the fact that he did not have authority to admit the nature of his acts is not a sound objection. Then when you ask this witness now about suits which were based upon alleged wrongful acts of the German industry, unless you follow that by an adjudication, there is no judicial determination of those acts and those suits or facts apart from those wrongful acts, and if that testimony is admissible at all it is admissible apart from the best evidence rule, admissible, as I see it, only as tending to establish the reputation among the trades in this country of the German industry. Whether that reputation has evidential value in this case apart from the facts themselves, I am not sure at this moment, and I will hear you on both sides. Now, if you are dealing with the reputation of the German methods of competition or methods of placing their products in the American markets, then I am led to the inquiry as to whether you cannot take the discussions and statements of the discussions at Paris in your Economic Section, and whether it is admissible on that ground. Now then, if it is not admissible on that ground, I think it is wholly inadmissible.

MR. KRESEL: Very well, your Honor, if there is an answer to that question I am perfectly willing to let it go out.

THE COURT: Strike it out.

MR. KRESEL: Because I can ask him the direct questions, what the facts were prior to the war with reference to this dumping and full line forcing.

XQ. 122. Mr. Patterson, will you state what your knowledge is with reference to those two methods of unfair competition of the Germans?

A. I am afraid I cannot, Mr. Kresel; I have no knowledge whatever of either of those practices before the war.

XQ. 123. Then if you cannot, you cannot, that is all that is necessary.

MR. ANDERSON: That saves me the necessity of making an objection.

XQ. 124. Prior to the war you were a buyer of dyes. Was there any competition?

A. There was competition, not in the true sense, but a competition between agencies. Each agent trying to secure a maximum.

XQ. 125. And when you speak of the agencies, what agencies do you refer to?

A. There were six principal German dyestuff vendors, divided into two groups, and those groups allied—

MR. ANDERSON: One minute, Mr. Patterson. If your Honor please, what is competition? This is getting into a very broad field of inquiry. The witness might have an opinion that there was no competition and I might have an opinion that there was. The facts must be established and the Court must reach a conclusion as to whether there is competition, if we are going to try that issue.

THE COURT: I think that does not prevent your getting the facts; but I think this objection will be sustained, and I assume that what you really asked the witness was whether there was any competition between the American industry and the German industry.

MR. KRESEL: No, your Honor, I was asking whether there was any competition among people who had dyes to sell, to his knowledge, he being a purchaser of dyes.

MR. ANDERSON: I submit, if your Honor please, if that could be asked of a witness, the trial of anti-trust cases would be one of the easiest jobs that was ever assigned to a lawyer.

MR. KRESEL: Well, we are not trying that.

MR. ANDERSON: So that is clearly iadmissible evidence.

MR. KRESEL: And that is directed, if your Honor please, to the allegation in the Bill wherein they charge that at the time of the sale of these patents there was a monopoly. I propose to go on from showing what the situation was in 1914 to what it was in 1919.

THE COURT: I think your question is open to Colonel Anderson's objection, but why can't you state that question so that it is not open to objection, and elicit the facts?

MR. KRESEL: All right, I will try to do that.

XQ. 126. Mr. Patterson, you have already stated that you were a buyer of dyes, and was that true during 1914 and for years before that?

A. It was true for many years before that. As to the exact moment, 1914, in the first part of the year, I had supervisory functions; I did not actually buy the dyes myself.

XQ. 127. You were the President of your concern?

A. Yes, sir.

XQ. 128. And you knew from whom your concern was buying dyes?

A. Yes, sir, I followed it closely.

XQ. 129. What I want to know is whether there were many concerns in the United States from whom you could buy dyes?

A. Yes, sir; there were a great many concerns.

XQ. 130. How many were there?

A. I have no idea. A great many.

XQ. 131. The dyes that you needed?

A. No, the dyes that I needed in my own business, there were only about four or five at first hand, sir. There were a great many jobbers and there were a great many people at second hand from whom we could buy dyes.

XQ. 132. German dyes?

A. German dyes, Swiss, to a limited extent, English to a limited extent. When they came in that manner you rarely knew what they were.

XQ. 133. You spoke of there having been agencies here of the German dye concerns. How many were there?

A. Six to the best of my knowledge.

XQ. 134. Could you buy your supply of dyes from each of those six?

A. Each of them did not make all that we wanted, but we could buy some part from—there were usually two or three making each thing, with the exception of a few patented colors, a good many of the patented colors, which were confined. Those did not, however, in my own business, concern me so much.

XQ. 135. So that is it the fact that you derived or bought your supply of dyes from some one or more of these agencies of the German concerns?

A. One or two Swiss.

XQ. 136. After 1914 did you get German dyes?

A. In 1914?

XQ. 137. Yes.

A. The shipment of German dyes practically stopped.

XQ. 138. And from that time on and until after we had gone into the war, and during the time that we were in the war, do you know whether there had been development in the United States of the chemical industry?

A. I know there has been a very large development of the chemical industry.

XQ. 139. In 1919 and in 1918 did you buy any dyes from the American manufacturers?

A. Would you give me the dates again?

XQ. 140. 1918 and 1919?

A. Oh, yes.

XQ. 141. Did you find that you could get most of your requirements from American manufacturers?

A. Well, in 1918 and 1919 we got much of it. Since then we get practically all; not all, but practically all.

XQ. 142. During 1918 and 1919, did you find that the market for dyes was such that there were people competing for your custom?

A. Yes, sir.

XQ. 143. Did you find that in 1918 and 1919 there was any monopoly of the dye industry in the United States?

MR. ANDERSON: Just one moment.

MR. KRESEL: I purposely put it in that way because it is so charged in the Bill.

MR. ANDERSON: If your Honor please, I do not suppose we can put experts on the stand to prove the existence of a monopoly in the United States, nor can we put witnesses on the stand to prove that a monopoly does not exist.

THE COURT: Colonel Anderson, I think your objection is sound for this reason. A Pleading consists of an allegation of the ultimate fact. An ultimate fact is not the evidential fact but the thing to be proved by evidential facts. So that I take it, Mr. Kresel, you are asking for an ultimate fact and not an evidential fact.

MR. KRESEL: I have got the evidential fact and I think I should be permitted to ask the ultimate fact.

THE COURT: I do not know what the evidential facts are which would support the negative of the allegations in the Bill.

MR. KRESEL: The witness has already testified that during 1918 and 1919 he bought his supplies from American manufacturers and that there was competitive bidding for his custom.

MR. ANDERSON: Of course, that was subject to

motion to strike out, but I did not want to object to the question generally, making so many objections; but when he comes to ask him to reach the conclusion that the Court has got to reach one way or the other, I think we are going too far.

MR. KRESEL: A man is entitled to state, certainly, what the fact was as he knew it in his own business.

MR. ANDERSON: Monopoly is not a fact. It is a conclusion of law from facts.

MR. KRESEL: Before your Honor rules, it seems to me that the man who buys dyes can be permitted to say that he had the choice of buying from half a dozen people and that they were competing for his custom.

THE COURT: I think that is not your question.

MR. KRESEL: That question has already been asked and answered.

THE COURT: I do not think we can permit the witness to draw a conclusion or state an ultimate fact from that. I think you must depend upon your evidential facts. I sustain the objection. You may put in your answer under Rule 46, if you desire.

MR. KRESEL: Oh, no, your Honor; there is nothing in that.

THE COURT: Objection sustained.

MR. ANDERSON: I move to strike out the answer of the witness to the effect that there was competition in the United States in 1918 and 1919. I thought it came under the way in which we are moving, but since counsel raised that objection, I move to strike it out. The witness can testify that he bought from various manufacturers. He can testify that these manufacturers were seeking his trade. But competition and monopoly are two of the most difficult things to establish. They are conclusions to be drawn from a very large series of facts.

THE COURT: I am wondering, Colonel Anderson,

as to whether it would be worth while to discuss that at length, because I assume that any Court would draw from the Answer as it stands, merely apparent competition. Unless the witness goes on and states further facts; then I should assume at least that what he meant was apparent competition, and I assume—or I have no right to assume it—but if you object to that testimony being so interpreted or so understood.

MR. ANDERSON: Not at all, sir.

THE COURT: Then we may not foreclose any other conclusion by saying to Mr. Kresel now that that will be the interpretation put upon it, and if he desires other interpretation or any other conclusion to be drawn judicially, he must offer further evidence to show that that was in fact competition and not merely apparent competition.

MR. ANDERSON: I am quite willing to let the record stand that way, sir.

XQ. 144. Mr. Patterson, during 1918 and 1919, do you know how many manufacturers of dyes and dyestuffs there were in the United States?

A. No, sir, I do not.

XQ. 145. Do you know from how many your concern bought dyes?

A. No sir, I do not.

XQ. 146. Do you know the names of any of them?

A. Yes, the National Aniline Company and the duPont. I cannot give you the full name of the duPont Company, I am sorry to say, but it will identify it sufficiently to say the duPont Company, of Wilmington.

XQ. 147. Just what are all those that you can recall?

A. The Calco Chemical Company. I have not been in charge of this since the war. I am no longer familiar with the details. Unless I ask I am not told.

XQ. 148. You have not been buying your dyes since 1919?

A. Since 1914, I have not been in personal charge of it.

XQ. 149. But you have been supervising it, I think you said?

A. Supervising it.

XQ. 150. So that you can not recall any more than the three that you have mentioned?

A. No, sir.

XQ. 151. But you have bought your supply almost—your total supply—from American manufacturers, that you do know?

A. Yes, sir. May I add two more to that list which have occurred to me. We also bought from the Franklin Import & Export Company, and from the Textile Alliance, Inc.

XQ. 152. That was this organization of which you are President.

A. Yes, sir.

XQ. 153. Was that in the business of dealing with dyes?

A. We dealt in the reparation dyes which we brought over at the request of the State Department.

XQ. 154. What are those dyes that you speak of as the reparation dyes?

A. Annex VI of the Peace Treaty provided for the impounding of certain German stocks which existed at the time of the Armistice, and 25 per cent of the annual German production thereafter to be distributed under the supervision of the Reparation Commission on behalf of all of the Allies. Each of the Allies shares, or to be more accurate, has a right to share in that distribution. The share of the United States was approximately one-fifth. In September, 1919, the State Department requested the Textile Alliance to take charge of that distribution, and under several success-

ive agreements affecting the reparation dyes, and one purchase which I referred to before, made by a representative of the State Department under option, the Textile Alliance has distributed many million dollars in three years—in four years.

XQ. 155. It is only in that connection that the Textile Alliance was in the dyes industry?

A. No, in nineteen—

XQ. 156. It did not manufacture, did it?

A. It was not a manufacturer.

XQ. 157. It owns no factories?

A. No, sir.

XQ. 158. Mr. Coudert suggests that the Textile Alliance did not go into this reparation dye business for profit?

A. No, sir, it went into it at the request of the State Department, and under these various agreements to which I have referred. Complete arrangements for the distribution of any surplus receipts were made. None of them could accrue to the Textile Alliance.

XQ. 159. Are there profits accrued?

A. Only surplus of receipts over expenditures; no profits accrued to the Textile Alliance.

XQ. 160. And what has become of that surplus?

A. Part of it has been distributed in accordance with the terms of the agreement and other portions are still held to be distributed in the same manner.

XQ. 161. Distributed under whose authorization?

A. A part of them under the authorization of our own Board of Directors; part of them under the authorization of the State Department; and part of them under the supervisions of underwriters of a certain fund which was made up for the purchase of certain of these dyes.

XQ. 162. But in so far as the Textile Alliance as an organization is concerned, did it make any profit out of this reparation dye transaction?

A. No, sir, it did not.

XQ. 163. Or you personally?

A. Nor I personally in any way.

XQ. 164. Did you ever receive a salary as officer?

MR. ANDERSON: That is objected to.

MR. KRESEL: I withdraw it.

MR. ANDERSON: Is your Honor willing to sit for a little while longer?

THE COURT: How much longer?

MR. ANDERSON: I should think for only a very short time.

THE COURT: We will run until half past three, then.

MR. ANDERSON: I think I can get through with any questions that I want to ask Mr. Patterson in a very short time.

RE-DIRECT EXAMINATION

By MR. ANDERSON:

RDQ. 165. Mr. Patterson, you said that you brought in these dyes—reparation dyes—in the name of the Textile Alliance?

A. Yes, sir.

RDQ. 166. Under arrangement with the State Department?

A. Yes, sir.

RDQ. 167. Did you pay any license to the Chemical Foundation as the holder of German patents for importing those dyes?

A. We paid approximately ten per cent on all dyes on which patents were held by the Chemical Foundation or by other holders of the patents.

RDQ. 168. Do you know how much you paid The Chemical Foundation?

A. I have the amount here and will give it to you.

RDQ. 169. Well, let us have it?

A. I hold in my hand a certificate of public accountants, Messrs. Garraway, Guthrie & Co., as follows:

"June 5, 1923. To whom it may concern:

We certify that the Textile Alliance, Inc., has paid in royalties on imported dyes."

RDQ. 170. If it is a long paper, Mr. Patterson, you can state the amount. There is no use in reading the whole paper here. We will accept that statement.

MR. COUDERT: Just the sum total.

THE WITNESS: I am sorry; they have given me the wrong paper. I have certificates of two concerns.

MR. COUDERT: He has brought down the wrong one. Can you remember roughly?

THE WITNESS: "We certify that the Textile Alliance, Inc., has paid in royalties on imported dyes to the Chemical Foundation, Incorporated, up to and including December 19, 1922, the sum of $208,880.90, and the further sum of $6,107.46, in 1923, for royalties up to and including April, 1923. Yours very truly, Barrow, Wade, Guthrie & Co."

The total is $215,000 approximately.

RDQ. 171. Can you say whether that represented approximately 10 per cent of the value of these dyes?

A. Approximately 10 per cent. There may be a slight adjustment for discount one way or the other. It is approximately 10 per cent.

RDQ. 172. So that you paid royalties to the Chemical Foundation on all reparation dyes under the Treaty of Peace—imported under the Treaty of Peace, which were covered by former German patents owned by The Chemical Foundation?

A. Yes, sir.

RDQ. 173. And this amount which you have stated represents to the best of your knowledge and belief the actual aggregate amount paid on that item?

A. Yes, sir.

RDQ. 174. You said that the control of those dyes —reparation dyes—was vested in part in the State Department, I think, and also in part in certain underwriters?

A. Yes, sir.

RDQ. 175. To whom did you refer in the term "Underwriters?"

A. After the first two distributions of the reparation dyes had been made, there remained in stock under the control of the Reparation Commission, several thousand tons which they proposed to return to the Germans unless they were immediately taken up by the participating—the countries entitled to participate in their distribution.

RDQ. 176. Now, Mr. Patterson, not to make the record too long—

A. It won't be long. It is very short.

RDQ. 177. If you were just to state what they were—well, go ahead.

A. It won't be long.

RDQ. 178. All right, go ahead.

A. I was in Paris at the time and there were only a few days and I agreed to underwrite the funds necessary to secure $100,000 worth of these dyes and a friend of mine who was in Paris agreed to write another $100,000 worth. Cabling this to the United States, the formal underwriting agreement was drawn up, approved by the Secretary of State and about forty underwriters, amounting to the sum of $400,000 were secured. I have the names and the amounts here if you wish it.

RDQ. 179. May I ask you this—I do not want to put in what is not necessary—were those underwriters, so far as you know, members of the American Dyes Institute or not?

A. So far as I know, they were not. There may

have been a few individuals. Almost all of them participated, because they wished to secure some part of the funds for educational and scientific institutions in their own localities; and the agreement with the Department of State provided that neither the Textile Alliance nor the Underwriters should profit from this arrangement, but that all of the funds should be divided in the following manner: Three-fourths should be paid to the Treasury Department, to be dealt with by Congress upon the recommendation or after the recommendation of the Secretary of State, and the other fourth was to be distributed by the Underwriters in return for this underwriting, to educational and scientific institutions, or rather, to be more accurate, for educational and scientific purposes.

RDQ. 180. When you say that the proceeds were to be distributed, you mean the net proceeds after deducting the royalties?

A. The net proceeds, yes, sir.

RDQ. 181. Those licenses for importation of dyes were controlled by a Committee of the War Trade Board. Were they not originally? Or did that apply to the reparation dyes which you have mentioned?

A. The licenses were originally controlled by the War Trade Board.

RDQ. 182. Yes.

A. Which had an Advisory Committee.

RDQ. 183. Do you remember who constituted that Board?

A. Oh, yes, I have a list of them here. Give me the list. (List handed to witness.)

November 20, 1919, the War Trade Board announced the appointment of an Advisory Committee on Dyes. The Committee was composed of the following gentlemen: Mr. Henry B. Thompson, Mr. Frank D. Cheney, Mr. Franklin Hobbs, Mr. Morris R. Poucher, Mr. August Merz, Mr. W. H. Watkins, Dr.

Charles H. Herty; all of whom were Civil Service employees. Do you wish the changes in the Committee?

MR. ANDERSON: I neglected to say, if your Honor please, what I should have said at the beginning of this cross-examination, as to the matters opened up by counsel, that I did so without waiving my objections. I cross-examine subject to that.

RDQ. 184. Mr. Patterson, you spoke of buying dyestuffs in 1913 and 1914 from various concerns; you said, with the exception of patented dyes, there were always several manufacturers of the same color or dye, did you not?

A. Not always, but in many cases there were.

RDQ. 185. Did you buy from American manufacturers as well as German manufacturers in that year?

A. As far as I recollect, we bought nothing or practically nothing from any American manufacturer at that time.

RDQ. 186. At that time?

A. Yes.

RDQ. 187. You bought from German manufacturers and Swiss manufacturers?

A. With possibly a very little from English, but that is negligible.

RDQ. 188. There were Swiss manufacturers and English manufacturers and German manufacturers selling in the United States, were there not?

A. Yes, sir.

RDQ. 189. When you spoke of the six German companies, you did not mean to include in these companies the Swiss and English manufacturers, did you?

A. No, sir; I did not.

RDQ. 190. And they did not include any of the few American manufacturers, so far as you know,

A. In what sense do you mean "include"? They were entirely separate, so far as I knew.

RDQ. 191. That is what I meant. You spoke of certain groups, etc. These groups of German manufacturers or importers, as the case may be, do not include such American manufacturers as there were, English or Swiss, or other foreign producers?

A. They do not include them, with one possible exception, as to the truth or falsity of which I do not know. It may be in connection with the Swiss, of which I have no knowledge.

RDQ. 192. You have no knowledge; so, if you do not know it, we do not want it.

A. In the other case, I am certain there were none.

RDQ. 193. You spoke, subject to my objection, of certain trade methods, such as bribery and what you call—what is it, full line?

A. Full line forcing is the term.

RDQ. 194. Full line forcing, and things of that sort. Mr. Patterson, did you know of these things of your own knowledge? Or did you learn it from others dealing directly?

A. I learned of it from others. I never knew of any of it from my own knowledge.

MR. ANDERSON: I renew my action to strike out all that evidence.

THE COURT: It is immaterial whether it goes out or stays in, under the circumstances.

MR. ANDERSON: I think so, but I renew the motion in order that the record may be complete.

THE COURT: I will deny the motion, Colonel Anderson, so that the record may stand as it is. It does not mean that there is any weight to be given to the testimony because of the last answer.

MR. ANDERSON: That is quite satisfactory to me, sir. I merely wanted to get the record straight.

THE COURT: I do not think it has any bearing, because I think it is too remote from the issues of this case. I do not know that I am concerned at all with these German practices, if they existed.

MR. ANDERSON: I do not think your Honor possibly could be, but that is for your Honor to determine. I merely want to get my record straight as I go along, and we will debate all those things, I suppose, at the conclusion of the trial.

RDQ. 195. You also spoke of certain suits that were brought. By whom were those suits brought?

A. The suits were brought by the individual plaintiffs who had been injured by these acts on the part of the vendors.

RDQ. 196. Were you one of these plaintiffs?

A. No, sir, I was not.

RDQ. 197. Do you of your own personal knowledge know anything of those suits? Were you in Court or did you ever see the Pleadings, or know anything about them?

A. Yes, sir; I read the Pleadings in many of them.

RDQ. 198. And your information is derived solely from those Pleadings; you had no interest in the suits yourself?

A. I had no interest in the suits myself. I carefully refrained from having any interest in them whatever.

RDQ. 199. You had no knowledge of the matters charged in those Pleadings except from what you gathered from the Pleadings themselves, did you?

A. From what some of the witnesses in the case told me.

RDQ. 200. Had told you?

A. Told me.

RDQ. 201. Your knowledge on the subject was purely hearsay from others including what you read in the Pleadings?

A. I could not say that I had not seen some documents from time to time relating to it.

RDQ. 202. That also would be a matter written by other people, would it not? That was not in the Court room?

A. No.

RDQ. 203. And if you read a document or paper, it was by somebody not in this Court-room now?

A. Yes, that is correct.

MR. ANDERSON: I renew the motion to strike out all that evidence.

RDQ. 204. You read, I think, as the purposes of the Textile Alliance, under examination, the protection of mill owners and operators from, and the prevention and reform of abuses, unjust and unlawful exactions, deceptions and frauds in the manufacture and sale of mill supplies and in the prevention and prosecution of unlawful, illegal and improper actions, misdemeanors and crimes in connection therewith. Is it not a fact that all of the members of your Association were American concerns?

A. You mean all the voting members of the Textile Alliance?

RDQ. 205. Yes, all the organizations which they in turn represented?

A. I can not say that that is a fact. There may have been foreign concerns that were members. In fact, I am quite certain that some of them were.

RDQ. 206. Was it not the practice of your organization to restrain, and if necessary, to prosecute what you regarded as improper practices on the part of American manufacturers as well as others?

A. Well, as a matter of fact, I am obliged to tell you that the war came on so soon after the Textile Alliance was organized that its original purpose of prosecution of these frauds for the sake of fraud itself was never carried out. We have never had time or

opportunity to carry that out and the work was diverted to the unjust abuses and exactions provision under which the importations of mills which we dealt with for the War Trade Board were carried on and under which our dealings with the State Department were also carried on. In that connection I have here the letter from the State Department in which that matter was finally dealt with, and in which their reason for the allocating of this work to the Textile Alliance was explained.

MR. ANDERSON: Do you want that letter to go in, Mr. Kresel?

MR. KRESEL: As long as he has it.

MR. ANDERSON: I have not the slightest objection to its going in, but I do not think it has any relevancy.

MR. KRESEL: I think you called it out by your question.

MR. ANDERSON: That is not in response to my question at all.

THE COURT: Do you want it out or shall it stay in?

MR. ANDERSON: I move that it be left out. We will have enough of a record any way without that.

THE COURT: Shall we strike the answer out completely and then have the question repeated?

MR. KRESEL: You do not want the whole answer to go out. It is only the latter portion to which you referred, Colonel Anderson.

MR. ANDERSON: I haven't any objection to the entire answer staying in and just leaving the letter out, because it simply has nothing to do with the situation—unless you feel, Mr. Patterson, that it is due to your organization that it should go in,

in which event, I am perfectly willing, if counsel consents, to have it go in.

THE WITNESS: May I ask my own counsel what his views are.

MR. ANDERSON: Certainly.

MR. COUDERT: That is a letter in which the State Department asked you to undertake that. I think it would be proper to read that into the record, to show this was an agency of the Government.

THE COURT: The witness' organization has been omitted from any charge of wrong doing in the Bill and we have stricken it out. I do not see any reason for embodying that letter in evidence unless it pertains to the issues of this case.

MR. ANDERSON: I quite agree; and unless there is some very good reason, I would like to leave it out, because it is a matter of character and we do not question their character.

MR. COUDERT: That is satisfactory to us in view of what you have done.

RDQ. 207. You testified earlier in your evidence that you obtained from Mr. Poucher a list of German-owned patents in the United States?

A. Yes, sir.

RDQ. 208. And sent it to Mr. Garvan, I think?

A. Handed it to him, my recollection is.

RDQ. 209. About what time was it you obtained this list?

A. The 13th of May 1918. That was the date that I handed it to him, as shown by a note on the letter.

RDQ. 210. You handed that list to Mr. Garvan at that time?

A. The memorandum is "Delivered to F. P. Garvan, May 13, 1916." I have no recollection of it apart from this letter.

RDQ. 211. But your letter shows that you did receive it from Mr. Poucher?

A. Yes, sir.

RE-CROSS EXAMINATION

By MR. KRESEL:

RXQ. 212. Can you state, Mr. Patterson, what became of those suits that you have mentioned?

A. I can state what one of the German's agents who was himself a defendant in one of the suits told me.

MR. KRESEL: No, you can not do that.

MR. ANDERSON: It would not be admissible anyhow.

RXQ. 213. Other than that, do you know about any of the suits?

A. Other than I have stated, only what he told me, and gossip.

MR. KRESEL: Then we can not have that.

THE COURT: Are you through on both sides with this witness?

MR. ANDERSON: Yes, sir. I think, with your permission, he can be permitted to go home.

THE COURT: He is discharged from the subpoena?

MR. ANDERSON: Yes, with the understanding that if we should need him again, we can call him without further subpoena.

THE COURT: Adjourned until 8:30 tomorrow, Standard Time.

(Whereupon at 4 P. M., Standard Time, adjournment was taken until tomorrow, June 8, 1923, at 8:30 o'clock A. M., Standard Time.)

FIFTH DAY.

Wilmington, Delaware,
June 8, 1923, at 9:30 o'clock A. M.

*Before:*

HON. HUGH M. MORRIS, U. S. District Judge.

Counsel present as before noted.

TRIAL RESUMED BEFORE THE COURT.

MR. ANDERSON: If your Honor please, I should like to call this morning the Secretary of the American Dyes Institute, with the privilege of cross-examining him as an adverse witness.

THE COURT: I did not understand the latter part of that statement.

MR. ANDERSON: I say with the privilege of cross-examining as an adverse witness.

THE COURT: If you establish that fact or if it becomes necessary for you to examine as in the case of cross-examination, then I will hear you. You may call the witness, and then if it is necessary for you to proceed as in cross-examination, we will determine that after the witness has demonstrated that fact.

MR. ANDERSON: I thought I would state that in advance. I did not know what your Honor's practice was in that regard.

## HARRY E. DANNER.

HARRY E. DANNER, a witness called on behalf of the plaintiff, being duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. ANDERSON:

Q. 1. Will you please state your name, place of residence and occupation?

A. My name is Harry E. Danner. Do you mean my home address?

Q. 2. Yes.

A. I reside at 293 Prospect Avenue, Mount Vernon, New York. I am engaged now at 320 Broadway, New York City, as a Secretary.

Q. 3. Secretary of what?

A. Of the National Association of Finishers of Cotton Fabrics.

Q. 4. How long have you been the Secretary of the National Association of Finishers of Cotton Fabrics?

A. Since July, 1914. That is about eight years, or just short of eight years.

Q. 5. Mr. Danner, were you ever connected with the American Dyes Institute in any official capacity?

A. I was.

Q. 6. If so, state what?

A. I was the Treasurer of the American Dyes Institute and for a period of time the Secretary of an Open Price Section of that Institute.

Q. 7. Do you remember how long you occupied the position of Treasurer and how long you occupied the position of Secretary of the Open Price Section of the Institute?

A. Well, I was Treasurer during the entire existence of the Institute. My recollection is the Institute was organized in the early part of 1918 and I was relieved of the Treasurership last March, I think, or April.

Q. 8. How long were you Secretary of the Open Price Section, as you call it?

A. The Open Price Section, I was Secretary during the period it functioned, which was from the inception of the organization until, I think, until April or May of 1920.

Q. 9. April or May of 1920. Was that, what you call an Open Price Section, what is commonly known as the Eddy Open Price System or method?

A. Yes, it was.

Q. 10. Could you state briefly what was the meaning of the Open Price Section, so-called, or how it operated?

MR. KRESEL: One minute, please. We object to that, if your Honor please, on the ground that it is immaterial and irrelevant. We can not see the bearing of this upon any of the issues that are tendered by the Bill of Complaint.

THE COURT: Will you read the question, Mr. Stenographer?

(Question No. 10 repeated as recorded above.)

THE COURT: I presume this is further evidence to show that the purpose of the persons who eventually became associated, at least as stockholders, in the defendant corporation, were moved by purposes other than patriotism.

MR. ANDERSON: That is a very good way to put it, sir. It also bears upon the charge of combination, the Eddy Open Price Section being recognized as one of the methods employed by this Institution was condemned in the Hardwood case by the Supreme Court as being a means for the creating of combinations and monopolies in trade.

THE COURT: Yes, but I am not able to see yet, Colonel Anderson—I do not mean I am stating a conclusion, because I have not reached a conclusion.

MR. ANDERSON: Of course, I understand your Honor's aim.

THE COURT: But I do not see yet how that is relevant to the issues of this case. You think it

is, so I am going to take your testimony over the objection of the defendant; but it seems to me possibly that the Government officials. whoever they may have been, the President or Alien Property Custodian, Mr. Polk or anybody else, may have realized that the purposes of the persons who were associated as stockholders of The Chemical Foundation may have had as their prime moving purpose, or the reason for their action, the prime reason for their action, business gain.

Now then, it seems to me that the President or such other officers as may have acted, may have said or reasoned, as American citizens or American organizations, they can have that purpose in mind, but the Sherman Act and the Clayton Act and other similar acts now on the Statute books or being put on, will take care of that. Our purpose is to get this industry in the hands of American citizens, who will be subject to America's control and regulations.

I may not have reasoned far enough, and I have not tried to reason it out, but it seems to me that the objection is valid. I am going to overrule it under our general working understanding.

MR. ANDERSON: May I make a statement so that your Honor might probably understand—just a few words?

THE COURT: Yes.

MR. ANDERSON: What your Honor says is quite true. There is nothing wrong, and I hope never will be anything wrong in American citizens following legitimate methods, trying to advance their own interests. That is fundamental in economical life, and I would be the last to criticize it. The sole question is whether they follow legitimate methods. If it should appear

that not only the American Dyes Institute, which I think the evidence now shows to have been the moving spirit in this whole matter, was engaged in the development of and in the operating of an illegal combination—with the best of purposes perhaps, but illegal—and if it should further appear that their desire to obtain and their efforts to obtain the consolidation of these patents into one organization, which they own, was but a step in the perpetuation of that monopoly, so-called, or control, and especially with reference to the prevention of competition from outside—English as well as German or anybody else—then I think it would be material as one of the steps in the development of that purpose, to show all of their relationships leading up to that act, and then the purchase of these patents and the formation of The Chemical Foundation would be in itself founded upon an illegal purpose.

THE COURT: I see your line of thought. My difficulty is, Colonel Anderson, in seeing how that is relevant to a sale to The Chemical Foundation. I am trying to reason it out. I probably have not reasoned, of course, as much as you have; but it seems to me that if The Chemical Foundation had been a complete monopoly—American monopoly—and had that fact been known to the Government officials dealing with it, that that would not, in and of itself, invalidate the sale. That is merely an impression which I have, and I give voice to it now only because of the objection that has been made. Now, if you were trying the Sherman Act case or a monopoly case, it would seem to me that would be pertinent; but as it stands now, I think the objection is well taken; but that is only a temporary ruling.

MR. ANDERSON: I shall not argue the question further at this time. I think I can show your Honor that if the evidence is going in subject to objection, when we come to argue that question I can argue the legal aspects very much more fully.

MR. KRESEL: May I also suggest to your Honor that whatever the purpose of this open price section might have been it no doubt appears in writing in some way, either they had a constitution or by-laws or agreement and what not, and that of course would be the best evidence, and I suggest to the Colonel that he inquire of the witness whether there was any such agreement in the way that I have indicated.

MR. ANDERSON: We have already introduced the Constitution in evidence. As a matter of fact we have taken up a good deal of time about a question which was really connecting up. If there is any serious objection to the question, I will withdraw it.

MR. KRESEL: Very well.

THE COURT: If you go ahead with this witness, you are going to come to the same issue in other questions.

MR. ANDERSON: Suppose we let the witness answer. If it is not material, it won't be considered.

THE COURT: I think the best evidence rule, that is my recollection, does not extend to matters so remote as this, but it can be extended to the more direct issues of the case.

THE WITNESS: I am afraid I will have to ask you to repeat the question now. I have lost it.

(Question No. 10 repeated as recorded above.)

MR. ANDERSON: Please strike out the last words, "so-called," from the question.

A. The Open Price Plan was a method by which the seller was placed in the same position as the buyer in respect to obtaining, collecting and having before him accurate information as to the actual conditions in the trade in respect to prices.

Q. 11. Did the members of the Open Price Section report their prices from time to time on their business through the organization?

A. Under that plan, yes.

Q. 12. Mr. Danner, yesterday there was a letter introduced as Plaintiff's Exhibit No. 21, written by Mr. C. Cyril Bennett to H. E. Danner, Secretary of the National Cotton Finishers' Association, Mr. Bennett writing as Secretary of the American Dyestuffs Association. I hand you a photostatic copy of that exhibit, and ask you if you recall that letter and can identify it as a letter received by you?

A. I recall this letter, yes.

Q. 13. That is a letter received by you and the attached memorandum accompanied it so far as you recall?

A. Yes, outlining the British plan of embargo, as I recall. That was addressed, was it not, to me as Secretary of the Cotton Finishers' Association?

Q. 14. Yes.

A. No connection with the Institute.

By Mr. Kresel:

Q. 15. That is, no connection with your connection with the Dyes Institute?

A. Yes.

By Mr. Anderson:

Q. 16. You were at that time Secretary of this Open Price Section of the Dyes Institute?

A. Yes, I was.

Q. 17. Yesterday there was introduced as Plain-

tiff's Exhibit No. 23, a letter from yourself as Secretary, dated August 1, 1918, to Mr. Frank Hemingway, in which attention was called to a meeting of the industry at Hotel Biltmore, on June 25, 1918, and the appointment of a special committee to represent the Dyestuffs Manufacturers and urge upon the War Industries Board the importance and the necessity of establishing the manufacture of dyes and intermediates as an essential industry, and other matters. I show you a copy of the letter. Were you present at that meeting of the Association?

A. I was.

Q. 18. Do you recall what plans, if any, were discussed for establishing the manufacture of dyes and intermediates as an essential industry?

A. My recollection is—it is a long time ago—that this was a question that involved the shipment of coal and the necessity of getting coal to run the plants during the war period and that we talked over at that time the importance of presenting to the War Trade Board or the proper authorities in Washington the necessity of the dyes industry being provided with the necessary coal to run their plants during the period of the war.

Q. 19. I read from this letter which I have referred to dated August 1, 1918:

> "It was the judgment of this Committee that in order to obtain a proper hearing they must be officially accredited as representing the industry, and therefore Dr. Matthews is preparing to submit to the executive committee of the American Dyestuff Manufacturers' Association, Inc., and also the executive committee of the Chemical Alliance, the advisability of both organizations appointing Mr. Patterson, Mr. Green, and Mr. Hasson as their representatives before the War Industries Board.
>
> "In line with the above, I am therefore ad-

dressing this letter to each member of the executive committee, and would ask that you kindly advise by return mail, if possible, if you, as a member of the executive committee of the American Dyes Institute vote to appoint the above mentioned gentlemen as a committee to represent the American Dyes Institute in the matter outlined aboye.

"If The Chemical Alliance, The American Dyestuff Manufacturers' Association, Inc., and The American Dyes Institute through their executive committees appoint this special committee, it will feel more confident of receiving proper recognition by the War Industries Board."

So far as you recall, the only thing discussed which called for the appointment of this committee to have representation of the business or industry before the War Industries Board was a matter of coal?

A. That is my recollection.

Q. 20. That is all that was discussed at that time?

A. Yes.

Q. 21. On January 25, 1919, it appears that you wrote to Mr. Cottingham, as President of the American Dyes Institute, a letter which was introduced yesterday as Plaintiff's Exhibit No. 27, a copy of which I will hand you for your examination?

A. I recall the letter, Colonel Anderson.

Q. 22. You state that this matter referred "to the possibility of the members of the American Dyes Institute undertaking to purchase all the present German patents and operating licenses held by the Alien Property Custodian. Mr. Poucher explained that the Alien Property Custodian was anxious to wind up his affairs and had proposed that the above mentioned patents be purchased by a corporation, who would, in turn, re-sell same to those interested," etc. Were you present at the time that this matter was discussed in the American Dyes Institute?

A. I believe I was.

Q. 23. Do you recall the testimony in any way?

A. Well, I recall that Mr. Poucher reported that the Alien Property Custodian was anxious to close his office and that the suggestion had been made that the patents that had been seized be sold to a corporation.

Q. 24. The patents which had then been seized?

A. That is my recollection.

Q. 25. Did Mr. Poucher say when he had this conference with the Alien Property Custodian; did he report when he had this conference with the Alien Property Custodian?

A. I do not recall that he did. He may have or he may have not. I do not know.

Q. 26. Do you recall whether there was any statement made as to what patents had been seized or anything in connection with the character of the patents which had been seized?

A. Well, it was the German patents for dyestuffs taken out in this country.

Q. 27. And that referred to the German patents which had then been seized and which the Alien Property Custodian wanted to get rid of in order to close up his office, as you understand it?

A. That is my recollection.

Q. 28. It appears that on January 22, there was a meeting of the executive committee of the American Dyes Institute, the minutes of which were introduced yesterday as Plaintiff's Exhibit No. 26. This is the meeting to which you refer, is it not, in your letter?

A. The 22nd of January is the date?

Q. 29. Yes?

A. Yes.

Q. 30. In the minutes of that meeting it is stated that the question of the practicability and advisability

of the American Dyes Institute undertaking (through a properly organized corporation) to purchase all German owned patents (for the manufacture of dyes and intermediates) from the Alien Property Custodian, was discussed at length. Then it goes on and states the general purposes, and upon that statement, a special committee was appointed to investigate the subject and make recommendations to the members of the Institute at the next regular meeting. That committee consisted of Mr. M. R. Poucher, Chairman, Mr. Wigglesworth, Chairman of the National Aniline and Chemical Company, Mr. August Merz, of the Heller & Merz Company, and Mr. Cottingham, ex-officio member of the Sherwin-Williams Company. Mr. Cottingham was then President of the Association, was he not?

A. He was.

Q. 31. You recall the appointment of that Committee?

A. Yes, I do.

Q. 32. You notified the members of the committee of their appointment, did you?

A. I did.

Q. 33. Did you attend any meetings of that committee or conferences between them?

A. Of that sub-committee?

Q. 34. Of that sub-committee?

A. No, Colonel. I do not recall that I ever was with them at all. Subsequently I was at a meeting where they reported to an executive committee meeting.

Q. 35. You have referred to a meeting at which that committee reported to the executive committee. I hand you a photostatic copy of what appears to be the minutes of the meeting of January 31, 1919, of the executive committee of the American Dyes Institute,

signed by you as Secretary. I will ask you to examine it and say whether those are the minutes of the meeting which you now referred to at which the committee reported?

A. That is correct. That is the meeting to which I refer now.

MR. ANDERSON: We offer in evidence, if your Honor please, as Plaintiff's Exhibit No. 29, the minutes of the meeting of the executive committee of the American Dyes Institute of January 31, 1919, identified by the witness, and ask that it be marked.

MR. KRESEL: To which, if your Honor please, we object upon the same grounds that we urged to the exhibits that were introduced yesterday.

THE COURT: Admitted under like conditions and for the same reasons.

Received in evidence and marked "Plaintiff's Exhibit No. 29." (*See Exhibits, Vol. I, page 110.*)

MR. ANDERSON: I will ask permission to read this (reading from Plaintiff's Exhibit No. 29).

Q. 36. To interrupt the reading of the exhibit you recall the submission of that report by Mr. Poucher, do you not, Mr. Danner?

A. Yes, I do.

Q. 37. You have looked at these minutes. Would you say that was the report as submitted, certified by you?

A. Yes.

(Mr. Anderson continues reading from Plaintiff's Exhibit No. 29.)

Q. 38. Who was Mr. Barrows, do you know?

A. I think he was connected with the National Aniline Company.

MR. KRESEL: The minutes show, the minutes

that you read, you see, he was one of the representatives of the National Aniline Company. Do you see that, the third name?

MR. ANDERSON: I beg your pardon.

THE WITNESS: That is my recollection, he was with the National Aniline.

MR. ANDERSON: He was connected with the National Aniline.

(Mr. Anderson continues to read Plaintiff's Exhibit No. 29.)

Q. 39. I hand you a photostat copy of what purports to be a letter or a copy of a letter, unsigned, by the Secretary of the American Dyes Institute to Honorable A. Mitchell Palmer, then Alien Property Custodian. Did you write that letter or can you recall it (handing witness)?

MR. KRESEL: What is the date?

MR. ANDERSON: It is the 7th of February, I think.

THE WITNESS: February 8th, I think.

Q. 40. February 8th?

A. I think that is an "8." It is rather blurred. It is February 8th.

MR. KRESEL: Yes, it is February 8th in my photostat.

MR. ANDERSON: I have got the wrong letter, so I will strike that out. I will scratch that matter, with the permission of counsel. This is February 7th, Mr. Kresel, the one I wanted.

MR. KRESEL: Yes. I think that was offered yesterday, was it not?

MR. GALLOWAY: No, that was not offered yesterday.

Q. 41. Mr. Danner, I hand you what purports to be a letter from the American Dyes Institute to Mr. A. Mitchell Palmer, Alien Property Custodian, dated

February 7, 1919. Do you know anything about that matter, or can you identify it (handing witness)?

MR. KRESEL: What is the question? What do you mean, whether he knows anything about it?

MR. ANDERSON: I mean do you know whether that letter was sent.

MR. KRESEL: We will concede it was sent and received by the Alien Property Custodian; so there is no question about that.

MR. ANDERSON: Very well. I thought the letter was written by this witness; but with the permission of counsel and your Honor I will strike out the reference to the letter, and introduce it direct at this point on the record.

THE COURT: It is now offered?

MR. ANDERSON: Offered. I now offer in evidence a letter dated February 7, 1918—

MR. KRESEL: 1919.

MR. ANDERSON: 1919, signed American Dyes Institute (blank), President, Secretary, Counsel.

THE COURT: Same objection?

MR. KRESEL: Yes, your Honor.

THE COURT: Same ruling. It is admitted.

MR. ANDERSON: The original of this letter is signed by Walter H. Cottingham, President, H, E. Danner, Secretary, A. L. Eddy, Counsel, and by the Executive Committee, J. Merritt Matthews, William T. Miller, Frank Hemingway, August Merz and M. R. Poucher.

Q. 42. I notice you signed that letter as Secretary. That is your signature to the letter, is it not?

A. Yes, I recall signing the letter. It is A. J. Eddy—not "A. L."

MR. ANDERSON: I offer in evidence the letter above referred to as Plaintiff's Exhibit No. 30.

MR. KRESEL: The objection has already been

urged, your Honor, and I understood that your Honor has already ruled.

THE COURT: Same ruling, for the same reason.

Received in evidence and marked "Plaintiff's Exhibit No. 30." (*See Exhibits, Vol. I, page 118.*)

MR. ANDERSON: The letter is presented, all this correspondence bears directly on the meat of the case, and I ask leave to read it. It is addressed to Mr. Palmer, dated February 7, 1919, on the stationery of the American Dyes Institute (reading from Plaintiff's Exhibit No. 30).

THE COURT: Is not that the same letter which you read in your opening?

MR. KRESEL: I did, your Honor.

THE COURT: I recall that very clearly, and that will save the trouble of reading it now.

MR. ANDERSON: I will be very glad to have it just understood that it is read. I only want to state at this point, that that is a letter transmitting this report which I have just read, to Mr. Palmer. That is my main purpose in reading it; so as to connect it up.

Q. 43. Now, Mr. Danner, I hand you photostat copy of what appears to be a letter of February 8, 1919, addressed by yourself to Honorable A. Mitchell Palmer; and will you say if you wrote and sent that letter?

A. Yes, this is the one you showed me just before.

Q. 44. You identify that letter?

A. Yes, sir.

MR. ANDERSON: We offer in evidence letter dated February 8, 1919, from Mr. Danner, as Secretary of the American Dyes Institute, to Honorable A. Mitchell Palmer, Alien Property Custo-

dian, attention of Mr. Loder, which we ask to be marked as Plaintiff's Exhibit No. 31.

MR. KRESEL: The same objection, your Honor.

THE COURT: Admitted under like conditions as the preceding exhibits.

MR. KRESEL: That will be Exhibit 31?

MR. ANDERSON: 31, yes.

Received in evidence and marked "Plaintiff's Exhibit No. 31." (*See Exhibits, Vol. I, page 122.*)

MR. ANDERSON: The letter is as follows: (Reading.) I also offer in evidence letter dated February 8, 1919, addressed to Mr. M. R. Poucher, of the E. I. DuPont de Nemours and Company, signed by Mr. Danner, as Secretary American Dyes Institute, which goes in under the stipulation, and I ask that the same be identified as Plain- Exhibit No. 32."

THE COURT: Admitted under like conditions.

MR. KRESEL: Yes, sir; and in addition to that, we desire to urge as to this letter, that it is addressed to Mr. Poucher, not to the Alien Property Custodian nor to the defendant here, and in our view, is not binding upon us.

Received in evidence and marked "Plaintiff's Exhibit No. 32." (*See Exhibits, Vol. I, page 122.*)

MR. KRESEL: What number is that?

MR. ANDERSON: No. 32. To Mr. Poucher (reading from Plaintiff's Exhibit 32).

THE COURT: I assume that this record is going to be printed before it is taken up for consideration by me.

MR. ANDERSON: Yes, sir.

THE COURT: Because I have the same difficulty in reading photostat copies as you do, I suppose, and it is practically impossible for me to decipher them, and it retards the speed with which

the work can be done a great deal. If it is going to be printed, I am not concerned with it, but if it is not going to be printed I want you to put in evidence something other than photostat copies.

MR. ANDERSON: May I have a little discussion with counsel on the subject, not going on the record?

THE COURT: Yes. I had supposed you were going to print your record anyway, because you can use the same record for the Appellate Courts as here.

MR. KRESEL: Did you want to know anything, Colonel?

MR. ANDERSON: Do you happen to know where they are?

MR. KRESEL: I do not. They are possibly in the office of the Dyes Institute.

MR. GALLOWAY: I believe it was stated it was in your safe deposit box of exhibits.

MR. KRESEL: We have carbons.

MR. ANDERSON: I quite agree with your Honor. I would not read those things for anybody in the world.

MR. KRESEL: It is very trying on the eyes.

MR. ANDERSON: Have you copies of those?

MR. KRESEL: Yes.

MR. ANDERSON: I now offer in evidence the minutes of the meeting of the Executive Committee of the American Dyes Institute, of February 7, 1919, containing the report of the Committee referred to in this letter.

Q. 45. Is the report of the Committee embodied in those minutes the one you sent in substitution for the other?

A. I presume it is. I have no record of it.

MR. ANDERSON: Now, I will not read that

report, if your Honor please. I offer it in evidence as Exhibit Number whatever it is.

MR. KRESEL: Are you offering the entire minutes, or only the report?

MR. ANDERSON: I am offering the entire minutes.

MR. KRESEL: We raise the same objection, your Honor, that it is immaterial and irrelevant, and may I see that, because I do not seem to have a copy of that (handed to Mr. Kresel).

MR. ANDERSON: They are the February 7th minutes. I was going to read some part of it.

MR. KRESEL: Well, Colonel, what went to the Alien Property Custodian with that letter of February 8th, Plaintiff's Exhibit 31, was only the report; not the minutes?

MR. ANDERSON: I understand. It is understood that only the report as embodied in these minutes went to the Alien Property Custodian for substitution for the report already introduced, but I want to introduce at this point the entire minutes including the substituted report.

MR. KRESEL: Your Honor has noted our objection?

THE COURT: Yes. I am assuming that all this testimony is subject to your objection, whether you make it when the exhibit is offered or the question asked or not, because I understand from your opening, that all this is immaterial and irrelevant, from your standpoint.

MR. ANDERSON: Yes, I understood that also.

Received in evidence and marked "Plaintiff's Exhibit No. 33." (*See Exhibits, Vol. I, page 123.*)

MR. ANDERSON: While marking that exhibit, I will not read the subsequent report, but merely call the attention of the Court to two changes in

it. One is the omission of the sentence to the effect that Mr. Hoguet suggested informally the price of $250,000. The exact language I do not recollect. The second is that the last clause of the original report, substituted the following: "Pursuing the matter further, your Committee had a conference with the Executive Committee of the Manufacturing Chemists' Association, in company with Mr. Joseph H. Choate, Jr., and Mr. Ramsay Hoguet, representing the Alien Property Custodian. The result of this conference was a resolution endorsing the plan and promising co-operation.

MR. KRESEL: Colonel, of course, you are aware that there are other differences between the two reports?

MR. ANDERSON: I was not aware there were any material differences, but if there are, the comparison will show.

MR. KRESEL: Those will speak for themselves. I simply did not want you to be quoted as saying that those are the only two differences.

MR. ANDERSON: If there are others—those are the only two I now recall. That was the purpose of introducing the two reports, to call that to the attention of the Court, for what they may mean. The only part of these minutes that I will read at this point is certain correspondence embodied in the minutes as their conclusion (reading).

THE COURT: Colonel Anderson, I wondered if the sole purpose of that is not to call my attention to the fact that certain funds were advanced by the industry to the Alien Property Custodian.

MR. KRESEL: Which is not denied, your Honor. It is admitted in our Pleading.

THE COURT: I know, but I wondered, if that is all you want to show, whether we could not save—

MR. ANDERSON: No, your Honor, there is another purpose.

THE COURT: I am sorry.

MR. ANDERSON: I would prefer not to state the purpose because it will open up a good deal of discussion. But I am through with that letter, just through reading it.

THE COURT: Since we have stopped for a moment, Mr. Kresel, may I make this suggestion in the interest of expedition; that is, all questions and all exhibits that are asked and offered may be taken as objected to by you without you making express objection to each question, and it will not be necessary for you to object to each question and note an exception, because you may have that generally, unless you have something to offer which has not been called to the attention of the Court in any specific objection to the Court heretofore stated or in your argument. Merely in the interests of expediency.

MR. KRESEL: Your Honor, we are simply careful in order that we may not be confronted hereafter with the suggestion that our objections were only general and that no grounds therefor were assigned. Therefore, we are very glad to accept your Honor's suggestion, provided it is understood, your Honor, that the objection is based upon all the grounds that were heretofore urged; and if, as your Honor says, any specific objection or ground occurs to us, we will call it to your Honor's attention.

THE COURT: Other than such as may be drawn and properly drawn from your whole opening argument.

MR. KRESEL: The opening.

THE COURT: Or any objection that —

MR. KRESEL: Any ground of objection that we have heretofore urged.

THE COURT: Heretofore made. Is that satisfactory—in the interest of expedition, Colonel Anderson?

MR. ANDERSON: Yes, if your Honor please. It is entirely agreeable to me and I am very glad indeed to have it understood that that will be the case.

THE COURT: Because I think both you and I understand the general nature of their objections and—

MR. ANDERSON: While it would be desirable if they have to add to their general nature they indicate it, in order that I may meet it if I think it is well taken.

MR. KRESEL: Certainly.

MR. ANDERSON: Beyond that I do not require counsel to object to every question.

THE COURT: And you waive now any right you have in this Court or in the Appellate Court to raise any question on that ground?

MR. ANDERSON: On the ground that exception is not taken to each question; yes, sir.

MR. KRESEL: And on the ground that the grounds of the objection are not urged to each specifically.

MR. ANDERSON: In order to make it perfectly clear—because these things sometimes become the subject of controversy—I will state that the Government here agrees, stipulates on the record, that counsel for the defendant will be taken to have objected to every question and every exhibit presented in the record on the present subject of investigation, until further notice and that the

objections taken are on the general grounds already stated upon the record, that only where special and additional grounds are urged is it required that an objection be required upon the record.

MR. KRESEL: And in considering the grounds of our objections, that it must be taken into consideration in connection with the claims made in the opening of counsel in behalf of the defendant.

MR. ANDERSON: I am perfectly willing that that should be the case.

MR. KRESEL: All right. Thank you very much.

MR. ANDERSON: In order to conclude this correspondence, although it is a letter, not from this witness, but which under the stipulation can be introduced as proved, I offer, on behalf of the plaintiff, a letter dated February 21, 1919, from Mr. M. R. Poucher to C. C. Bennett, Secretary of the American Dyes Institute, which I will ask to be identified as Plaintiff's Exhibit No. 34.

THE COURT: Admitted under like conditions.

Admitted in evidence and marked "Plaintiff's Exhibit No. 34." (*See Exhibits, Vol. I, page 135.*)

MR. KRESEL: What was the date of that?

MR. ANDERSON: That was February 21st.

(Mr. Anderson then read Plaintiff's Exhibit 34.)

Q. 46. Do you know who Mr. Weston was?

A. I have seen Mr. Weston. He was connected with the DuPont Company and the publicity end of their business. That is my recollection.

Q. 47. Did you have anything further to do with this matter of the sale by the Alien Property Custodian

and the purchase by the Chemical Foundation of these patents, other than the correspondence which has been indicated?

A. Nothing whatsoever.

Q. 48. Did you have anything to do with the organization of the Chemical Foundation, Incorporated?

A. Nothing whatsoever.

Q. 49. Your connection with the matter then terminated at the termination of the correspondence which has been read here in all respects?

A. That is correct.

Q. 50. You know nothing of your own knowledge

A. (To Question 49 continued) Except in so far as advancing that money.

Q. 51. Oh, you did advance the money in the name of the Dyes Institute for the payment of the expenses of searching for these patents at Washington, or listing them, or whatever it was?

A. That is correct.

Q. 52. To whom did you make those advances?

A. To Mr. Gordon.

Q. 53. At whose direction?

A. Well, I was instruced to do so by the Institute.

Q. 54. With whom did you confer or advise as to the handling of that matter in New York other than the Institute, if anyone?

A. Well, I saw Mr. Hoguet at one time and asked him how I would send this money down and to whom I would send it.

Q. 55. Do you recall the amount advanced by the Institute; I mean the aggregate amount.

A. Why, it was in the neighborhood of $9500; something less than $9500.

Q. 56. Was that money ever repaid to the Institute?

A. Yes.

Q. 57. By whom?

A. By the Chemical Foundation.

Q. 58. How was the money raised? Did it come out of the treasury funds of the Institute or by contribution?

A. There was $5000 of that total which was advanced by, I think, five individual members each subscribing $1000. That was kept as a loan fund. That was repaid to those members.

Q. 59. Do you recall who those members were?

A. Why, I think the Heller & Merz Company, I think the Grasselli, the DuPont Company and the National.

Q. 60. You mean the National Aniline & Chemical Company?

A. The National Aniline. How many is that, four?

Q. 61. Four.

A. I think the Newport would be the fifth.

Q. 62. The Newport Company?

A. Yes.

Q. 63. They advanced a thousand dollars, which aggregates $5000, and then how did you raise the balance?

A. The balance came from the treasury of the Institute and was kept in that special account so that we knew the total advanced.

MR. ANDERSON: That is all.

MR. KRESEL: Before asking Mr. Danner any questions, I think it is proper that I should suggest that the suggestion made by Colonel Anderson, when he called the witness, that he was calling him as a hostile witness, with the right to cross-examine, has been shown by the testimony of the witness to have been unnecessary, if I may

use that term. I think that will be conceded by Colonel Anderson.

MR. ANDERSON: I did not intend to reflect upon the witness in any way and I explained to him in advance that I was going to make that request and that it was not a personal reflection, but a technical method of procedure.

THE COURT: And which was found unnecessary.

MR. ANDERSON: I have not cross-examined the witness and therefore, obviously, I did not find it necessary.

CROSS-EXAMINATION

By MR. KRESEL:

XQ. 64. Mr. Danner, your attention was called to the fact that on February 7th, there was sent to Mr. Palmer, the Alien Property Custodian, a letter from the Dyes Institute with which there was enclosed a report. Do you follow me that far?

A. I do.

XQ. 65. That on the next day, a letter was written to Mr. Palmer, for the attention of his Secretary, enclosing another report with the request that the second be substituted for the first; do you follow me there?

A. I do.

XQ. 66. Is it a fact that the first report enclosed with the letter of January 7th was the original report of the sub-committee of the Executive Committee of the Dyes Institute that had this matter in charge?

A. I am afraid you confuse me a little, Mr. Kresel.

XQ. 67. Well, perhaps I do.

A. Just repeat the last part of that. I followed you up to that point pretty well.

XQ. 68. I see the report which was sent to Mr.

Palmer with the letter of February 7th was a report of a sub-committee of the Executive Committee?

A. Yes, and made to the Executive Committee.

XQ. 69. And made to the Executive Committee. The report which was substituted for that one was a report of the Executive Committee itself presented to the full meeting of the Dyes Institute held on the 13th of January,or rather, the 7th of February?

A. 8th of February.

MR. ANDERSON: If your Honor please, I think the minutes speak for themselves as to what that report was. That is purely argumentative.

MR. KRESEL: Not at all.

MR. ANDERSON: The minutes show who signed both reports.

THE COURT: Do you differ at all from Mr. Kresel, as indicated by his question?

MR. ANDERSON: Oh, yes. As I recall, both reports are signed by the same sub-committee.

MR. KRESEL: Oh, no. Let me have the exhibits. I do not think we need to have any differences on that point, certainly.

MR. ANDERSON: Then if there is no difference, why ask the witness?

THE COURT: Will counsel confer before arguing it.

MR. KRESEL: Will you just repeat the last question?

(XQ. 69 repeated as recorded above.)

A. My recollection is it was the following day. I am very poor on dates.

XQ. 70. I show you Plaintiff's Exhibit 33. You notice the meeting of the Dyes Institute was February 7th?

A. Yes, this is the meeting of the Executive Committee of the Dyes Institute on February 7th.

XQ. 71. Was it at that meeting that the special committee made a report to the full committee of the Executive Committee?

A. Yes, this report is embodied here.

XQ. 72. Mr. Danner, in one of these letters that were introduced in evidence, the suggestion was made, in so far as advances made by the Dyes Institute to finance the search of these patents that an account should be kept and submitted. Was there an account submitted to the Dyes Institute indicating how the money was spent?

A. By Mr. Gordon?

XQ. 73. I do not know by whom?

A. Yes: Mr. Gordon. I can answer directly. He did submit a full accounting of his expenses in connection with the searching of the titles.

MR. KRESEL: Mr. Galloway, have you that accounting?

MR. GALLOWAY: We have not. You have the papers of the Dyes Institute here. They are in your offices. That is where we got them from.

XQ. 74. Do you know where that accounting now is?

A. They are presumably filed with the books and records of the Treasurer, which were turned over to the Institute.

XQ. 75. Mr. Danner, please look at this photostat copy of a letter dated February 28, 1919, addressed to you as Treasurer of the American Dyes Institute—it is not signed. My information is it was written by Mr. Gordon. State whether that is the letter you refer to with which Mr. Gordon sent an account of how the money was spent?

A. That is correct. That is the letter I had in mind.

MR. KRESEL: Subject to correction of it by

comparison with the original, gentlemen, may I have that introduced?

THE COURT: No objection to its being admitted out of order, is there, Mr. Galloway?

MR. GALLOWAY: None whatever.

Received in evidence and marked "Defendant's Exhibit No. 2." (*See Exhibits, Vol. IV, page 2029.*)

MR. GALLOWAY: I shall not stop to read that at present, your Honor.

That is all, Mr. Danner.

THE COURT: Is Mr. Danner under subpoena?

MR. ANDERSON: He is. If there is no objection, I am perfectly willing to release him.

MR. KRESEL: There is no objection on our part.

THE COURT: You are discharged from any obligation to return under the present subpoena.

THE WITNESS: Thank you very much.

MR. ANDERSON: If we should want you again, you would come back on call?

THE WITNESS: Oh, yes, indeed.

MR. ANDERSON: If your Honor please, the record now in its proper development has reached the point where we are compelled to introduce additional documentary evidence. We tried to stop some of the witnesses who were on their way here today. Mr. Wigglesworth is here and I would like to ask that he be excused at the present time; not released from the subpoena, but excused.

THE COURT: He is under your control until the case is closed.

MR. ANDERSON: I only want that understood. He will come back some time next week.

MR. KRESEL: Of course, we cannot object to

any arrangement the Colonel can make with his witnesses.

MR. ANDERSON: I did not want to do that without the consent of the Court.

Mr. Galloway will proceed with the introduction of the documentary evidence, if your Honor please.

THE COURT: In so far as you can, Mr. Galloway—I do not think I need to suggest it—if you will state the substance of the papers rather than read them, it will help me. I find it impossible to remember the details of a long document or even a short document and unless you state its purpose, the chances are that I will not fully understand it. So if you will help me in that way, I will be very much obliged.

MR. GALLOWAY: I am very glad to say, if your Honor please, which I think will encourage us all, that the longer documents have practically all been submitted and that what follows will be largely the shorter ones.

THE COURT: I shall not undertake to limit you, but if you can state the main purpose of each document, it will be helpful.

MR. GALLOWAY: I will be very glad if I can, your Honor. It is only those which we consider especially important which we shall ask to read.

The plaintiff now offers in evidence an Alien Property Custodian office memorandum from Mr. Hoguet to Mr. Palmer, dated January 28, 1919. This is quite short and I will ask your Honor for permission to read it.

THE COURT: Admitted under like conditions.

Received in evidence and marked "Plaintiff's Exhibit No. 35." (*See Exhibits, Vol. I, page 136.*)

(Mr. Galloway then read Plaintiff's Exhibit 35.)

MR. GALLOWAY: Plaintiff next offers, under the stipulation, a copy of a letter from H. E. Danner to August Merz, dated February 11, 1919. This, in substance, states, your Honor, that it was decided, at the meeting of the Dyes Institute, that it was necessary to establish a fund for the payment of the expenses for the search of these patents and that Mr. Poucher had already paid $500, and it was agreed that the firms represented on the Executive Committee should each pay a thousand dollars. He therefore asks for his remittance.

THE COURT: Who is Mr. Merz?

MR. GALLOWAY: The letter shows it is Mr. August Merz, of the Heller-Merz Company, Newark, New Jersey.

THE COURT: Admitted under like conditions.

Received in evidence and marked "Plaintiff's Exhibit No. 36." (*See Exhibits, Vol. I, page 137.*)

MR. GALLOWAY: Plaintiff also offers in evidence, under the stipulation, an identical letter, except for the addresses.

MR. KRESEL: May I interrupt you, Mr. Galloway? When you say "under stipulation," you mean under the stipulation waiving authenticity?

MR. GALLOWAY: Absolutely. That is correct.

MR. KRESEL: I do not want the record to be confused because without a suggestion of that sort from me, it might be deemed that we had stipulated that these should go in.

MR. GALLOWAY: Not at all.

MR. KRESEL: So, if you will just omit the word stipulation. Of course, the stipulation speaks for itself.

MR. GALLOWAY: I will be very glad to do that.

THE COURT: Admitted under like conditions.

Received in evidence and marked "Plaintiff's Exhibit No. 37." (*See Exhibits, Vol. I, page 138.*)

MR. GALLOWAY: Plaintiff's Exhibit 37 was addressed to W. T. Miller, Secretary of the National Aniline & Chemical Company.

I also offer in evidence, on behalf of the plaintiff, an identical letter except as to the addressee, this letter being addressed to Mr. M. R. Poucher, of the E. I. duPont Company.

THE COURT: Admitted under like conditions.

Received in evidence and marked "Plaintiff's Exhibit No. 38." (*See Exhibits, Vol. I, page 139.*)

MR GALLOWAY: I have here, and offer in evidence on behalf of the Plaintiff, a letter from M. R. Poucher, Director Dyestuffs Sales Department, duPont Company, to Mr. H. E. Danner, Secretary, American Dyes Institute, dated February 12th, in which he states he has passed on his request for a thousand dollars for the Washington fund.

THE COURT: Admitted under like conditions.

Received in evidence and marked "Plaintiff's Exhibit No. 39." (*See Exhibits, Vol. I, page 140.*)

MR. GALLOWAY: No. 81. The plaintiff now offers in evidence a letter from the Secretary of the American Dyes Institute, Mr. Danner, to Mr. Will T. Gordon, dated February 19, 1919, stating that he is sending a check to be used—a check for $2000 to be used in the expense of searching title.

THE COURT: Admitted under like conditions.

Received in evidence and marked "Plaintiff's Exhibit No. 40." (*See Exhibits, Vol. I, page 140.*)

MR. GALLOWAY: The plaintiff next offers in evidence letter dated February 21, 1919, to Mr. H. E. Danner, Secretary, American Dyes Institute, from M. R. Poucher, Director, Dyestuffs

Sales Department, duPont Company; and it is rather short and I will read a portion of it. I will not read all of it.

THE COURT: Admitted under like conditions. In future I am going to take them all under like conditions and let that be understood.

Received in evidence and marked "Plaintiff's Exhibit No. 41." (*See Exhibits, Vol. I, page 141.*)

MR. GALLOWAY: This letter, if your Honor please, reads in part as follows: (Reading.)

The plaintiff next offers in evidence a letter from Mr. H. E. Danner to M. R. Poucher, of the E. I. duPont Company, dated February 24, 1919, replying to the letter which we have just read.

THE COURT: Admitted.

Received in evidence and marked "Plaintiff's Exhibit No. 42." (*See Exhibits, Vol. I, page 142.*)

MR. GALLOWAY: This letter, if your Honor pleases, summarized, states than an additional check for $2000 has been sent to Mr. Gordon, and it makes a total of $4000 to February 24th. That they have received a thousand dollars each from the Heller & Merz Company, the Sherwin-Williams Co., the E. I. duPont de Nemours & Co., the Calco Chemical Company, and the National Aniline and Chemical Company, Inc., and that this leaves Frank Hemingway, Inc., The Grasselli Chemical Company and the Ault & Wiborg Company missing.

The plaintiff next offers in evidence a letter from Mr. Danner, Secretary of the Dyes Institute to Mr. M. R. Poucher, of the E. I. duPont de Nemours & Co., dated February 26, 1919.

THE COURT: Admitted.

Received in evidence and marked "Plaintiff's Exhibit No. 43." (*See Exhibits, Vol. I, page 143.*)

MR. GALLOWAY: This letter, if your Honor pleases, states an additional $2000 has been sent to Mr. Gordon, and that they believe it will cover the total cost, and they understand the work has been completed, and there is a total of 4500 patents.

MR. KRESEL: May I see that, to see if I have a copy of it? (Handed to Mr. Kresel,) It says a total of 45,000 patents.

MR. GALLOWAY: Yes, a total of 45,000 patents.

MR. KRESEL: That is the reason I wanted to see the Government's copy. My copy says 45,000 patents and this says the same. I do not know what the explanation is. I assume the plaintiff will show some explanation.

(Mr. Galloway reads from Exhibit No. 43.)

MR. GALLOWAY: Plaintiff next offers in evidence a letter from Mr. Danner to Will T. Gordon of the Alien Property Custodian's office in Washington, dated March 12, 1919.

THE COURT: It is admitted.

Admitted in evidence and marked "Plaintiff's Exhibit No. 44." (*See Exhibits, Vol. I, page 144.*)

MR. GALLOWAY: This is a letter concerning the payment of money. I do not think I shall read it to your Honor.

THE COURT: That is not a new exhibit.

MR. GALLOWAY: No, it is the last one I offered. It is a letter concerning the payment of money between the Dyes Institute and Mr. Gordon.

We next offer in evidence a letter dated March 14th, from Mr. Danner to Mr. Gordon, enclosing a check for $2,350.

THE COURT: That is admitted.

Admitted in evidence and marked "Plaintiff's Exhibit No. 45." (*See Exhibits, Vol. I, page 144.*)

MR. GALLOWAY: We next offer in evidence a letter dated September 24, 1919, to Mr. Danner of the American Dyes Institute from the E. I. duPont de Nemours Company, requesting the return of a thousand dollars that they had paid for this purpose, and stating that Mr. Poucher advised some time ago that he would take up with them and that they would like to have some idea as to when this money would be received back.

THE COURT: It is admitted.

Admitted in evidence and marked "Plaintiff's Exhibit No. 46." (*See Exhibits, Vol. I, page 145.*)

MR. GALLOWAY: We offer in evidence next a letter dated September 24, 1919, to Mr. Clymer of the E. I. duPont de Nemours Company, by Mr. Danner, which is in response to Plaintiff's Exhibit No. 46 which has just been introduced here.

THE COURT: It is admitted.

Admitted in evidence and marked "Plaintiff's Exhibit No. 47." (*See Exhibits, Vol. I, page 146.*)

MR. GALLOWAY: This letter states that the duPont Company is correct in its understanding that this one thousand dollars is to be returned as soon as the Institute is repaid by the Foundation, and that they have requested the Foundation to pay him, but they have not received their remittance, and it says: "We have asked Mr. Poucher to take this matter up with the Chemical Foundation."

We next offer in evidence a letter dated February 28, 1919, to the American Dyes Institute, from F. E. Barrows. Mr. Barrows is one of the patent attorneys.

MR. KRESEL: What date is that?

MR. GALLOWAY: February 28, 1919.

THE COURT: The addressee is whom?

MR. GALLOWAY: The American Dyes Institute.

THE COURT: It is admitted.

Received in evidence and marked "Plaintiff's Exhibit No. 48." (*See Exhibits, Vol. I, page 147.*)

MR. GALLOWAY: That letter is only about two pages and I think it is quite important, so I will ask your Honor's indulgence. (Reads Plaintiff's Exhibit No. 48).

THE COURT: By whom is it signed?

MR. GALLOWAY: It is signed by F. E. Barrows.

THE COURT: And to whom?

MR. GALLOWAY: To the American Dyes Institute. Mr. Barrows, you will recall, was a patent attorney for the National Aniline.

MR. KRESEL: Have you another copy that you might let us have? We do not seem to have a copy. But do not delay on my account, though.

MR. GALLOWAY: I think very probably I can find it in a minute here, Mr. Kresel, and give it to you.

MR. KRESEL: Go ahead, Mr. Galloway, don't bother about that.

MR. GALLOWAY: No, I do not find it, Mr. Kresel.

MR. KRESEL: Very well, go right ahead.

MR. GALLOWAY: Did you want this exhibit, Mr. Kresel? Did you want that now?

MR. KRESEL: I would like to see it. I want to get a copy of it because we have no copy.

MR. GALLOWAY: Mr. Offley suggests it is incorporated in the minutes of the Dyes Institute.

MR. KRESEL: Very well, then, don't bother.

MR. GALLOWAY: The Plaintiff next offers in evidence a letter dated January 15th, 1919, from Mr. Ramsay Hoguet, to Honorable A. Mitchell Palmer, Alien Property Custodian.

THE COURT: An inter-departmental letter?

MR. GALLOWAY: No, your Honor, it is a formal letter, Mr. Hoguet was in New York. It is not a memorandum.

THE COURT: It will be admitted.

Received in evidence and marked "Plaintiff's Exhibit No. 49." (*See Exhibits, Vol. I, page 149.*)

MR. GALLOWAY: That is defendant's request No 6. I do not know whether I should read this, your Honor.

THE COURT: Use your own discretion, but resolve all doubts in favor of not reading it.

MR. GALLOWAY: This outlines the discussion between Mr. Palmer and Mr. Hoguet as to the method of handling this and I think it is rather important. (Reading).

MR. KRESEL: Now, what is the number of that?

THE CLERK: 49.

MR. GALLOWAY: The plaintiff next offers in evidence, letter dated January 17, 1919, from Ramsay Hoguet to Mansfield Ferry, office of Alien Property Custodian, enclosing a copy of a letter which we have just read, to Mr. Palmer.

THE COURT: Admitted.

Received in evidence and marked "Plaintiff's Exhibit No. 50." (*See Exhibits, Vol. I, page 156.*)

MR. GALLOWAY: The Plaintiff next offers in evidence a letter from Joseph H. Choate, Jr., to Mr. M. R. Poucher of the E. I. duPont de Nemours Company dated January 17, 1919—No. 165 under the stipulation.

THE COURT: Admitted.

Received in evidence and marked "Plaintiff's Exhibit No. 51." (*See Exhibits, Vol. I, page 156.*)

MR. GALLOWAY: This is quite short; it is only a few lines; and I will just read it. It is from Mr. Choate to Mr. Poucher, dated January 17, 1919. (reading).

We next offer in evidence a letter from Mr. Will T. Gordon, to Mr. Ramsay Hoguet.

MR. KRESEL: From whom was that?

MR. GALLOWAY: From Mr. Will T. Gordon, to Mr. Ramsay Hoguet, dated July 9th, in which it says: (Reading).

THE COURT: Admitted.

Received in evidence and marked "Plaintiff's Exhibit No. 52." (*See Exhibits, Vol. I, page 157.*)

MR. GALLOWAY: If your Honor please, the plaintiff next offers in evidence, the Minutes of the American Dyes Institute of December 9, 1918, held at the Hotel Biltmore in New York City, which sets out—I do not wish to read this—but I just wish to summarize it, and I think Mr. Kresel will very readily dispense with the reading, or waive the reading; which shows the amalgamation of the Manufacturing Chemists' Association or the American Dyestuffs Manufacturing Association and the American Dyes Institute which were two separate organizations at that time.

MR. KRESEL: What was the date of that?

MR. GALLOWAY: December 9th, 1918.

THE COURT: Admitted.

MR. KRESEL: There is nothing in the Bill of Complaint about that nor any indication as to how it is material or relevant.

MR. GALLOWAY: If your Honor please, I do not know that it is necessary to elaborate upon it under the ruling which your Honor has heretofore made.

MR. KRESEL: All right. It is admitted under the general rule. Go ahead.

THE COURT: I will hear you specifically at the time of argument upon all these matters.

Received in evidence and marked "Plaintiff's Exhibit No. 53." (*See Exhibits, Vol. I, page 158.*)

MR. GALLOWAY: Calling especial attention to page 8 of those minutes. I just want the record to show that.

MR. KRESEL: Are you putting in the whole minutes?

MR. GALLOWAY: Yes, the whole minutes.

MR. KRESEL: Do they all refer to that?

MR. GALLOWAY: No, just the minutes of that date.

MR. KRESEL: I mean the minutes of that date. Do the entire minutes refer to this amalgamation?

MR. GALLOWAY: No, we are quite willing to put in only the pertinent parts of the minutes and pick them out, if you wish. I said page 8 of the minutes.

MR. KRESEL: Unfortunately, I have not those minutes. May I look at them.

MR. GALLOWAY: We got them from your people this morning. Page 8 is the pertinent part.

MR. KRESEL: Without my taking up the time now to go through this, as I understand you, Mr. Galloway, you are only offering so much of these minutes as refers to the amalgamation of these two institutions.

MR. GALLOWAY: We will be glad to have it considered that way.

MR. KRESEL: I think at least it should be limited to that.

MR. GALLOWAY: We will be very glad to have it so limited.

THE COURT: Will you indicate now the portion which you desire admitted under that arrangement.

MR. GALLOWAY: Very glad to, your Honor.

THE COURT: You may indicate the portions during recess.

MR. KRESEL: I think that would be wise. We will not disagree as to that, Mr. Galloway.

MR. GALLOWAY: I will take it up in detail at that time, your Honor.

Plaintiff now calls attention to and offers in evidence the Articles of Incorporation of the Chemical Foundation, Incorporated, which are Exhibit B in the

Bill of Complaint. We ask that they be not duplicated in the record.

MR. KRESEL: Of course, they will not be duplicated, but you better give them an exhibit number so as to have the exhibits run in consecutive order.

MR. ANDERSON: Why not call it exhibit so and so of the Bill?

THE COURT: We will consider it marked Plaintiff's Exhibit 54 in the record and it will be found as Exhibit B of the Bill.

Considered marked "Plaintiff's Exhibit No. 54." (Same as Exhibit "B" to bill of complaint. *See Record, Vol. I, page 90.*)

MR. GALLOWAY: Plaintiff next offers in evidence, if your Honor please, the By-Laws of the Chemical Foundation. I think we should offer them in connection with the articles of Incorporation, because Exhibit B of the Bill includes both the certificate of incorporation and the By-Laws. So I would like to make the last exhibit include the certificate of incorporation and the By-Laws, which are Exhibit B of the Bill of Complaint, and ask that they be not duplicated in the record.

MR. KRESEL: There is no objection. May I make the suggestion, if there are any amendments that have been made to those By-Laws up to the date of your bill, I think those should go in.

MR. GALLOWAY: If you gentlemen have any such amendments, we shall be very glad to understand that they may be stipulated as in at this time and at this place.

MR. KRESEL: If I find there are any such, we will submit them to the Government and they may be included in this exhibit.

MR. GALLOWAY: We also ask to introduce at this time and offer in evidence a list of subscribers to the

Chemical Foundation, Incorporated, as the same appears in Exhibit C of the Bill of Complaint, and ask that the same be not duplicated in the record, with the statement that we are informed by counsel for the defendant that this exhibit should be corrected by adding a subscription by Merck & Company in the sum of $10,000.

Received in evidence as "Plaintiff's Exhibit No. 55, Exhibit C of the Bill." (Same as Exhibit "C" to bill of complaint. *See Record, Vol. I, page 107.*)

THE COURT: The authenticity of that list and accuracy is admitted under your stipulation?

MR. KRESEL: It is conceded under the stipulation, with the one addition, that of Merck & Company $10,000.

MR. GALLOWAY: Yes.

THE COURT: Admitted as corrected.

MR. GALLOWAY: The same appears at Page 107 of the Bill, and I wish to call your Honor's attention to the subscription of $125,000 by the E. I. duPont de Nemours Company, $50,000 by the General Chemical Company, $30,000 by the Grasselli Chemical Company, $20,000 by Heller & Merz Co., $50,000 by Marden, Orth & Hastings (Calco Chemical Co.), $37,500 by the National Aniline & Chemical Co., and $20,000 by The Newport Co.

The plaintiff next offers in evidence the minutes of the meeting, the first meeting of incorporators of The Chemical Foundation, dated March 3, 1919, at its principal office in Wilmington, Delaware.

THE COURT: That is not an exhibit to the Bill, is it?

MR. GALLOWAY: That is not an exhibit to the Bill.

THE COURT: It is admitted.

Received in evidence and marked "Plaintiff's Exhibit No. 56." (*See Exhibits, Vol. I, page 173.*)

MR. GALLOWAY: I do not wish to read this, of

course, to your Honor, I merely wish to state for the purpose of continuity in the presentation here that this shows the incorporation of this at the meeting by N. M. Clancy, P. B. Drew and H. E. Knox, incorporators, and it shows that Mr. Clancy owned thirteen shares of stock, P. B. Drew one share and H. E. Knox one share, and that the Charter and the By-Laws were there adopted.

MR. KRESEL: Mr. Galloway, is there any question but that this incorporation was attended to by the Corporation Trust Company, and as usual in those cases, they put in their own nominees as incorporators?

MR. GALLOWAY: Yes, but I called attention to that merely because I am going to another thing which I wish to read to the Court.

MR. KRESEL: I think the Court is entitled to know that that is the fact.

MR. GALLOWAY: The secretary presented transfers of subscription from M. M. Clancy, P. B. Drew and H. E. Knox to Francis P. Garvan, Douglas I. McKay and George J. Corbett for fifteen shares of common stock, to take effect at the close of the meeting, and the original transfers are thereto attached—attached to these minutes. It shows that Mr. Francis P. Garvan was transferred thirteen shares of the common stock at that time.

MR. KRESEL: Do you mean a subscription to that amount?

MR. GALLOWAY: A subscription was transferred.

MR. KRESEL: Not the stock.

MR. GALLOWAY: A subscription to thirteen shares of the common stock at that time, and Mr. Corbett and Mr. McKay were each transferred one share. It then shows an election of directors; Mr. Francis P. Garvan, Mr. Douglas I. McKay and Mr. George J. Corbett were elected directors following that.

MR. ANDERSON: I think it may be understood that the defendant may substitute copies of those minutes and withdraw the original.

MR. KRESEL: Yes, we will do that. Colonel Anderson suggests, and I am very much obliged to him for the suggestion, that he is willing to stipulate we may substitute copies of the minutes for the originals.

THE COURT: And in doing that when the counsel confer probably it can be materially shortened.

MR. KRESEL: Very likely.

MR. ANDERSON: We shall be very glad to do so.

MR. GALLOWAY: The plaintiff next offers in evidence the minutes of the first meeting of directors of the Chemical Foundation, held on March 8th, 1919, at 110 West 42nd Street, New York City, and this shows the presence of Mr. Francis P. Garvan, Mr. Douglas I. McKay, and Mr. George J. Corbett, the members of the Board, and it shows the election of Mr. Francis P. Garvan as President, Mr. Douglas I. McKay as Vice President, and Mr. George J. Corbett as Secretary and Treasurer. It also shows:

> "Further resolved that Joseph A. Choate, Jr., Esq., be retained as general counsel of the Company."
>
> "Further resolved that Ramsay Hoguet, Esq., be retained as patent counsel for the Company."

MR. KRESEL: We conceded all that in our Answer, didn't we, Mr. Galloway?

MR. GALLOWAY: Yes, I think you did, perhaps.

THE COURT: Then it is not an issuable fact.

MR. KRESEL: That was all alleged in the Bill and was all admitted by our Answer.

THE COURT: Then if the defendant admits all that you would have shown by those minutes had it denied them, do you want those minutes in?

MR. ANDERSON: If your Honor please, I think it would be wise, not so much for this Court, but in going

to the record, to have in that part of those minutes, and then at the conclusion of the reading of those minutes I was going to suggest to counsel for the defendant, that in preparing substitute copies for these exhibits, we cut down the minutes by agreement and attach a little stipulation saying that these extracts from the minutes should take the place of the original minutes.

THE COURT: I am not going to begin to restrict you now on a matter of that kind, but I do not think the exhibit has any place at all in the record. But in view of the facts intended to be shown thereby, having been admitted by the Answer, however, that is a minor matter.

MR. ANDERSON: We will make it very short.

MR. GALLOWAY: The minutes also show the subscription to this document of Mr. Garvan, which has not been admitted by the defendant, and which are new.

THE COURT: Admitted.

Received in evidence and marked "Plaintiff's Exhibit No. 57." (*See Exhibits, Vol. I, page 179.*)

THE COURT: If there are eventually such an amount of matters of this kind as you think should not be, your protection is—

MR. KRESEL: Moving to strike out?

THE COURT: You may make your motion to strike out, but simply keep the record as it is, but your protection will be a matter of course, that is in taxing costs.

MR. KRESEL: I know the Government is not going to put in much that is not necessary.

MR. GALLOWAY: If the Court please, the plaintiff next offers in evidence minutes of the Board of Directors' meeting of the Chemical Foundation held at the office of the Alien Property Custodian, 110 West 42nd Street, New York City, on Friday, April 4, 1919,

Present: Mr. Garvan, Mr. McKay, and Mr. Corbett, which shows, Mr. Joseph H. Choate, Jr. of counsel for the company, presented and read a form of prospectus intended to be used in securing the distribution of the underwritten stock, the same was adopted. (Mr. Galloway continuing reading).

THE COURT: It is admitted.

Received in evidence and marked "Plaintiff's Exhibit No. 58." (*See Exhibits, Vol. I, page 187.*)

MR. GALLOWAY: If your Honor please, we offer next in evidence minutes of the meeting of the Board of Directors of the Chemical Foundation held June 19, 1919, in New York (present: Mr. McKay and Mr. Corbett), which shows that Mr. Ramsay Hoguet, patent counsel of the company, presented and read a form of assignment from the Alien Property Custodian to the Chemical Foundation, Inc., covering fifty-three patents and twenty applications for letters patent in consideration of the sum of $3,650, and that said assignment was approved.

Received in evidence and marked "Plaintiff's Exhibit No. 59." (*See Exhibits, Vol. I, page 203.*)

MR. GALLOWAY: If your Honor please, plaintiff next offers in evidence a list of subscribers of the Chemical Foundation as the same appears in Exhibit D of the Bill of Complaint and subject to such corrections as the defendant may, in accordance with the records, make. I am informed that there is some correction to that, Mr. Kresel. I have asked for a corrected copy.

MR. KRESEL: That is all right. Subject to correction there is no objection.

THE COURT: Admitted in accordance with the understanding of counsel.

MR. GALLOWAY: And with the request that it be not duplicated in the record.

Received in evidence and marked "Plaintiff's Ex-

hibit No. 60." (Same as Exhibit "D" to bill of complaint. *See Record, Vol. I, page 108.*)

**Mr. Galloway: Plaintiff next offers in evidence a voting trust agreement as to the stock of the Chemical Foundation, as the same appears in Exhibit E of the Bill of Complaint on page 110 thereof and asks that the same be not duplicated in the record.**

**The Court: Admitted.**

Received in evidence and marked "Plaintiff's Exhibit No. 61." (Same as Exhibit E to bill of complaint. *See Record, Vol I, page 110.*)

**Mr. Galloway: Plaintiff next offers in evidence, if your Honor please, minutes of a meeting of the Board of Directors of The Chemical Foundation, Incorporated, held in New York City, on November 20, 1919 (present: Mr. Francis P. Garvan, Douglas I. Mc Kay and George J. Corbett).**

**The Court: Admitted.**

Received in evidence and marked "Plaintiff's Exhibit No. 62." *(See Exhibits, Vol. I, page 204.)*

**Mr. Galloway: In these minutes I wish to call the Court's attention to the following (reading from Plaintiff's Exhibit No. 62).**

**If the Court please, we next offer in evidence the minutes of the stockholders' meeting of The Chemical Foundation, Inc., held at the offices of The Chemical Foundation, in New York, on December 2, 1919, at 2:30 P. M.**

**The Court: Admitted.**

Received in evidence and marked "Plaintiff's Exhibit No. 63." (*See Exhibits, Vol. I, page 207.*)

**Mr. Galloway: We wish to call the Court's attention at this time to those portions of the meeting which state, being the remarks of Colonel McKay, the vice-president of the company—it says (reading).**

**The Constitution was then read.**

Mr. Kresel: It is annexed to your Bill, as I recall.

MR. GALLOWAY: It is annexed to the Bill, and I am not going to read it.

Page 118, if your Honor please, of the Bill.

MR. HERSHKOPF: That has to be corrected. There were some typographical errors in the exhibit.

MR. GALLOWAY: Yes. All these are subject to correction anyhow under the stipulation.

It appears on page 118 of the bill, if your Honor please.

THE COURT: That is a part of the exhibit last admitted, or is this a new exhibit which you offer?

MR. GALLOWAY: I shall offer this draft later; I shall offer later the minutes.

THE COURT: Very well.

MR. GALLOWAY: The Constitution, I should say, and By-Laws.

Mr. Howard, speaking in that meeting, states (reading).

I also wish to call the attention of your Honor to the statement by Mr. Choate in that meeting, commencing: "The Foundation owns a great number of patents, some of which must be of great potential value." (Reading further.)

The minutes go on and show a long discussion, after which the Constitution was adopted.

Plaintiff next offers in evidence, if your Honor please, the Constitution and By-Laws of The Chemical Foundation Advisory Committee, being Exhibit F to the Bill of Complaint, and asks that the same be not duplicated in the record.

THE COURT: Admitted.

Received in evidence and marked "Plaintiff's Exhibit No. 64." (Same as Exhibit "F" to bill of complaint. *See Record, Vol. I, page 118.*)

MR. ANDERSON: If your Honor please, it was anticipated that with the testimony of Mr. Danner this morning and this formal evidence, the day would be consumed up to the hour of adjournment; and, there-

fore, as the time for recess has been nearly reached, I shall ask the Court to suspend here.

THE COURT: You have reached a point where it is convenient for you to stop?

MR. ANDERSON: I think it would save time, because we have not organized the evidence as yet.

THE COURT: Then the case will be resumed at 8:30 o'clock A. M., standard time, Monday morning.

(Whereupon, at 12:15 P. M., adjournment was taken until Monday, June 11, 1923, at 8:30 o'clock A. M., standard time.)

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## SIXTH DAY.

Wilmington, Delaware,
June 11, 1923, at 8:30 o'clock a. m.,
Standard time.

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*Before:*

HON. HUGH M. MORRIS, U. S. District Judge.

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Counsel present as before noted.

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TRIAL RESUMED BEFORE THE COURT.

MR. ANDERSON: Is your Honor ready to proceed?

THE COURT: At your convenience.

MR. ANDERSON: I ask to call Mr. W. T. Gordon to the witness stand.

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## WILL T. GORDON.

WILL T. GORDON, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. ANDERSON:

Q. 1. Please state your name and place of residence?

A. Will T. Gordon, Washington, D. C.

Q. 2. What is your profession?

A. I am an attorney at law, specializing in patents.

Q. 3. Were you at any time in 1918 and 1919 connected with the Office of the Alien Property Custodian, and if so, in what capacity?

A. I entered the employ of the Alien Property Custodian in the latter part of 1918, about the first of September, and served as an attorney in the Bureau of Investigation until the first of January of the following year. I then was assigned to the patent investigation.

Q. 4. State what took place, if anything, in connection with your assignment to the "patent investigation," as you call it—how that came about?

MR. KRESEL: If that calls for conversation, I should like to know with whom the conversation was had.

MR. ANDERSON: If you state any conversation, I would like you to limit it to the Alien Property Custodian, or the officers of the Alien Property Custodian, or the officers of The Chemical Foundation.

THE COURT: And designating the persons.

MR. ANDERSON: Designating the person in each case.

A. I think the beginning of that was when Mr. Garvan came to Washington and assigned me to get all available information from various Government departments with respect to dyes and chemicals and particularly tariff schedules, and any speeches that had been made in Congress with respect to those particular schedules; and I supplied him with, oh, quite a bit of that information.

MR. KRESEL: Did Mr. Gordon fix the time about when this was?

MR. ANDERSON: January 1st, he said.

A. (Continuing) That was prior to January 1st—probably a month prior to the date that I was actually assigned to the patent work.

Q. 5. You speak of Mr. Garvan. Do you mean Mr. Francis P. Garvan?

A. That is true.

Q. 6. He was at that time head of the Bureau of Investigation in New York, was he not?

A. Yes.

Q. 7. Then he came down to Washington and asked you to get this information, and you sent him the information referred to?

A. That is true.

Q. 8. Then state what next took place in connection with or leading up to this assignment, limiting your evidence, as indicated, to conversations.

A. He sent for me to come to New York about the 1st of January, and I fix that date by reason of the fact that I remember spending New Year's Eve with some friends in New York, and either the day before New Year's Eve or the day after he sent me to Mr. Ramsay Hoguet, who was the patent adviser to the Custodian, to discuss ways and means of seizing enemy-owned patents.

Q. 9. Mr. Garvan sent you to Mr. Hoguet?

A. That is true.

Q. 10. Had you known Mr. Hoguet before that time?

A. No.

Q. 11. Now, state what took place on occasion of that visit to Mr. Hoguet?

A. Mr. Hoguet called a conference in his office of several patent attorneys who were interested in the dye and chemical business. Mr. Barrows was one of them.

Q. 12. Who was Mr. Barrows?

A. Mr. Barrows was with the firm of Pennie, Davis, Marvin & Edmonds, and I believe they represented the American—yes, the American Aniline & Chemical Company.

MR. KRESEL: The National Aniline.

Q. 13. Are you not mistaken in that? Isn't it the National Aniline?

A. National Aniline & Chemical Company.

Q. 14. And Mr. Barrows was present? Who else was present?

A. Mr. Prindle was present, who I understood represented the duPont Company.

Q. 15. Anybody else present at this conversation?

A. I think there were one or two others whose names I do not remember.

Q. 16. State now as far as you can what took place at the conference?

A. At that conference a discussion arose as to whether it was preferable to seize these enemy-owned patents or whether it was preferable and in the interest of the corporations interested in them to license them through the Federal Trade Commission under Section 10 of the Trading with the Enemy Act, and then in the event of seizure what character of patents would be of the greatest interest to seize, and it was determined that the most work that could possibly be accomplished would be the seizure of the chemical and dye patents, as there would not be time to seize others, and the result of that was reported to Mr. Garvan, I believe, the following day.

MR. KRESEL: When you say that, who made the report?

MR. ANDERSON: I will bring that out. It is better to take it in the regular order, I suggest. Let me examine him, and, of course, then you can cross-examine him to test his knowledge.

Q. 17. Did you see Mr. Garvan the following day?

A. I did.

Q. 18. And you reported the substance of that conference to Mr. Garvan, did you?

A. I did, with Mr. Hoguet.

Q. 19. It was then, as I understand it, determined at this conference at Mr. Hoguet's office to seize the dye and chemical patents.

MR. KRESEL: One minute. I object to that. That is not testimony.

MR. ANDERSON: That was the conclusion; but I withdraw the question.

Q. 20. Did Mr. Garvan approve the suggestion of the seizing of the dye and chemical patents on the day following the conference at Mr. Hoguet's office when these suggestions were reported to him?

A. He did.

MR. KRESEL: I object to that as calling for the witness's conclusion. The conversation is perhaps admissible.

MR. ANDERSON: If counsel wants to be technical, and wants me to ask what Mr. Garvan said—

MR. KRESEL: I think so, on a matter of this sort. We ought to have the conversation.

THE COURT: Of course, I cannot tell whether it is technical or not. I do not know about the ability of this witness to judge of the soundness of his conclusion. It would be better to let him give the conversation.

Q. 21. State as far as you can what was done after your report, done or said by Mr. Garvan after your report to him of the conference at Mr. Hoguet's office when you and Mr. Hoguet called on him, as you have stated?

A. I was primarily interested in the expense incident to conducting the investigation involved—

MR. KRESEL: Will you pardon me a minute, Mr. Gordon. I object to that and ask that it be stricken out as not responsive. The question was as to what the conversation was.

THE COURT: I assume you have no objection to doing that.

MR. ANDERSON: No.

(Q. 21. repeated as recorded above.) That is, what was done at that meeting with Mr. Garvan; what Mr. Garvan said or directed?

A. The matter of the expense was discussed. I think I probably brought up the subject. I cannot remember in detail what took place, but I do remember stating that it would require quite a little money to conduct the investigation; and probably Mr. Garvan stated, or Mr. Hoguet, that the Custodian was broke and had no funds to pay for such an investigation, and a discussion then went on between Mr. Garvan and Mr. Hoguet as to raising funds to pay for that investigation; and I believe Mr. Garvan suggested, "Ramsay, we had better give a dinner to the boys and suggest some means of assistance or raising funds for the purpose of this investigation."

Q. 22. Well, what was finally the conclusion of the matter so far as you recall it?

A. The conclusion was that I was designated as Ramsay Hoguet's assistant, and directed to return to Washington and start certain preliminary work prior to the actual investigation of title to the patents, which I did.

Q. 23. After that conference you returned to Washington, did you?

A. That is true.

Q. 24. State to the Court so far as you recall what you then did at Washington in connection with this matter.

A. It was necessary to determine what patents

had been reported to and seized by the Custodian in order that we would not make duplicate seizures. The records of the division had been poorly kept, and I spent a great deal of time going over those records to get that information prior to the actual abstracting of title of patents that had been reported or seized, and I devoted some time to that and general preliminary work prior to the beginning of the actual investigation.

Q. 25. You said you were assigned to that work as assistant to Mr. Hoguet?

A. That is true.

Q. 26. Did you report to Mr. Hoguet your work at that time?

A. Yes, he was my superior officer and I was directly under him and responsible to no one else.

Q. 27. You reported to him?

A. Yes.

Q. 28. Now, Mr. Gordon, you have now covered, as I understand it, the period of early January, 1919. The matters that you refer to were in that period, were they?

A. That is true.

Q. 29. Now, it appears in evidence here, by the minutes of a certain conference held at Washington, on the 27th day of January, 1919, the minutes of which have been put in evidence, between Mr. Choate, Mr. Hoguet, Mr. Ferry, Mr. Horne and a special committee of the Dyes Institute, and Judge Laffey, and others, that you were present at that conference. Do you recall that conference?

A. I do.

Q. 30. Have you read, to refresh your memory, the minutes of that conference as introduced here?

A. I looked it over hurriedly last night and this morning.

Q. 31. Do those minutes state substantially your recollection of what took place?

A. They do.

Q. 32. After that conference, did you have anything further to do with the matter of seizure of German dye and chemical patents?

A. Yes. I employed abstractors, typists, stenographers, and attended to all of the printing of the special forms, any reports and demands, and naturally directed the investigation of titles and passed on enemy status.

Q. 33. Yes.

A. And titles pertaining to all patents seized.

Q. 34. Were you still acting as assistant to and reporting to Mr. Hoguet?

A. Yes.

Q. 35. Did you take up this work actively after this conference?

A. I did.

Q. 36. Did you devote your entire time to it?

A. I did, from eighteen to twenty hours a day.

Q. 37. Now, I will ask you to state as accurately as you can what was done and with whom you worked in this matter—that is, who co-operated and who was working with you, how you did it; just take the proceeding and tell the Court what took place?

A. Before I started the investigation, I insisted that I have money to pay the abstractors, for the reason that from circumstances unnecessary to relate now I doubt if I could have secured men without they had absolute assurance that they would get their money weekly, and—

Q. 38. If I may interrupt, with your permission, it appears in evidence here by letter from you to Mr. M. R. Poucher, dated February 3, 1919, you wrote Mr. Poucher by instructions of Mr. Hoguet you had arranged for several abstractors to report to you on

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February 4th, and begin work on Classes 8 and 23, and that it would be necessary for you to have money to pay these abstractors, and that you drew on him for $500. Do you recall that, these circumstances?

A. I do.

Q. 39. You did draw on Mr. Poucher then for the sum of $500 with which to begin this work?

A. I did.

MR. KRESEL: Colonel, would you mind if I interrupted you a minute?

MR. ANDERSON: No.

MR. KRESEL: Is there any claim on the part of the Government that that was a personal contribution by Mr. Poucher? Was not that a sum of money that was subsequently repaid by The Chemical Foundation?

MR. ANDERSON: I do not deny that the money was subsequently repaid by The Chemical Foundation or that it was advanced on behalf of The Chemical Foundation, but it is one of the steps in the proceeding in this matter.

MR. KRESEL: Yes.

MR. ANDERSON: And I am not suing Mr. Poucher for that amount.

MR. KRESEL: I am not objecting to the evidence. I simply wanted, at this proper point, to have it understood that there is no claim on the part of the Government that Mr. Poucher personally made the contribution.

MR. ANDERSON: Not the slightest. That he advanced this money on behalf of the American Dyes Institute, and the evidence clearly shows that, already introduced, and I did not get the exhibit and read it, to save time.

MR. KRESEL: That is all right.

MR. ANDERSON: The substance is all here.

Will you read the question, please? I believe he answered. What is the answer?

(The answer to Q. 39 read as recorded above.)

Q. 40. Mr. Poucher actually sent you the $500?

A. He honored my draft.

Q. 41. With that sum you began work in abstracting or listing these patents for seizure; is that correct?

A. I first deposited that sum in the Washington Loan and Trust Company in the name of Will T. Gordon, agent for M. R. Poucher, I believe. I remember signing all checks as agent.

Q. 42. Who, if any one, was assisting you in this matter of getting these patents ready for seizure, whatever the proceeding was, and how?

A. Mr. Barrows and Mr. Squair were the first men assigned to that assistance.

Q. 43. You have stated that Mr. Barrows was the counsel or one of the counsel for the National Aniline. Do you know who Mr. Squair was?

A. He was a representative of the Patent Department of the duPont Company.

Q. 44. They were sent down to assist you in the Patent Office; is that correct?

A. They were sent down to select the proper character of patents to be seized; and that was quite a task, for the reason that it was necessary to have a printed copy of the patent itself, and in many cases necessary to read the specification and claims, and in all cases necessary for the purpose of getting the full name of the inventor and other information necessary before starting abstracting of title. They did that in an independent office, in the McGill Building, and submitted either printed copies of patents or memorandums containing the information necessary for an abstract of title prior to the actual abstracting of title and report and demands.

Q. 45. Did Messrs. Barrows and Squair select the patents to be seized by you or demanded by you under the arrangement?

A. They did.

Q. 46. Then I understand that they first made a selection and lists of the patents which were desired to be seized?

A. They made that largely from the list of enemy-owned patents compiled by the Federal Trade Commission.

Q. 47. Was that list of enemy-owned patents one which had been compiled by the Federal Trade Commission in connection with Section 10 of the Act, if you know?

A. I think that was the purpose of compiling it.

Q. 48. Did they then check those patents against the records in the Patent Office to get the list complete, or verify it, do you know?

A. I do not know of any way that they could have checked it except buying the individual patents at so much per copy.

Q. 49. After they had made the selection of patents to be seized, did they furnish you lists of patents which they desired seized?

MR. KRESEL: Which they desired to seize?

MR. ANDERSON: I will put it this way: Which were desired to be seized.

MR. KRESEL: May we know whose desire this is that is being expressed?

THE COURT: Yes.

MR. ANDERSON: Well, the witness has testified —of course, I can go through a very elaborate detail to get up to it—the witness has testified that Mr. Barrows and Mr. Squair made up the lists that were to be seized and furnished him those

lists. Now, then, I want to follow that through to show what he did.

MR. KRESEL: I beg your pardon, Colonel, but I did not so understand the witness to testify. He did not testify that the lists were of patents which were to be seized.

MR. ANDERSON: All right.

MR. KRESEL: The contrary will appear, I think.

THE COURT: The word used was "select." I am waiting myself to find out what is meant by the word "select."

MR. ANDERSON: Very good, sir.

Q. 50. State to the Court exactly the proceeding which was followed as between yourself and Messrs. Barrows and Squair in arriving at the patents to be seized?

A. I am not a chemist and would not recognize or would not at that time have recognized all patents of value pertaining to the dyes and chemical industry that would have been the most valuable for seizure. Mr. Barrows and Mr. Squair were specialists in that particular branch of patent law, and for that reason their assistance was very valuable in selecting the proper character of patents to be seized.

Q. 51. How did they select them and how did they indicate to you, if at all, what patents they had selected?

A. By sending them over to me in lots of anywhere from fifty to two or three hundred, depending upon the number they could finish in the course of a day or evening, and I arranged them in proper order and assigned attorneys to abstract title to the particular patents they referred to me. Now, when I say patents, I mean copies of patents that they sent to me.

Q. 52. Yes.

A. To be abstracted—printed copies of patents.

THE COURT: I would like to have the question read.

MR. ANDERSON: Please read the question that I put.

(The stenographer then read Q. 51 recorded above.)

Q. 53. Were those lists that they sent over to you written lists of patents?

A. Only written in cases where the printed copy was exhausted.

Q. 54. No, I mean was the list a written list; did they list the patents by numbers or how?

A. No.

MR. KRESEL: There was no list, as I understand it.

THE WITNESS: They bought—

Q. 55. They sent over to you copies of the patents?

A. They bought from the Patent Office copies of patents and submitted actual copies of patents.

Q. 56. To you?

A. To me. In cases where those printed copies were exhausted, they may pencil or pen notations as to the number, name, title and date, and other information necessary to make an abstract of title.

Q. 57. Did you confine your abstracting of the patents to those thus furnished to you by Messrs. Barrows and Squair?

A. I did until the work was practically complete, and then Mr. Hoguet would send me letters every few days suggesting additional patents that had not been seized, and just the general finishing up of the work, we seized patents—I believe Mr. Barrows and Mr. Squair both wrote several letters down after they had finished the main part of the work, and I seized patents that they wrote me about, and then applications, on information furnished us from the Patent Office.

Q. 58. When you speak of the main part of the

work, state what you refer to by the main part of the work?

A. Well, until after the first four or five thousand patents were seized. The first forty-five hundred, I believe, were included in the first sale.

Q. 59. Until that work was completed, that first list, you followed the patents furnished you by Messrs. Barrows and Squair?

A. That is true.

Q. 60. And confined yourself in abstracting and in seizing entirely those patents, did you?

A. To the lists they furnished.

Q. 61. After they furnished you those lists, Mr. Gordon, state briefly, not in a technical way, what procedure you followed?

A. I directed both the day and night force of twenty to thirty typists and stenographers and both the day and night force of attorneys actually making abstracts of title and passed upon all outstanding contracts and other instruments of record where such were found as to where title was vested and generally supervised the work being done.

Q. 62. In other words, you examined title to the patents, in brief language, is that it?

A. That is true.

Q. 63. Then did you examine it to ascertain whether it was enemy-owned within the meaning of the Act?

A. That is true.

Q. 64. After you determined or ascertained by your examination that in your view it was enemy-owned, what did you do then?

A. May I explain that word "enemy-owned," Colonel?

Q. 65. Yes, if you wish.

A. There was no way to determine definitely

enemy status in the case of a German inventor who received a patent prior to the declaration of war, stating he was a resident of Germany. He may have since moved from Germany to this country or to some neutral or allied country; and if that should have been the case, he would not have been an enemy, nor his property subject to seizure, and we had no way to determine, other than the statements in the patent, that he was a resident and a citizen of Germany.

In some cases, I knew, of course, that the German might be a resident of this country, and I made an agreement with Mr. Hoguet that whatever disposition was made of these patents that they would quit claim title to any patents where seizures had been made through mistake. If such mistakes were made, they were unavoidable at that time because of our inability to know definitely the residence or then citizenship of the alleged enemy.

Q. 66. Well, you said you made an arrangement with Mr. Hoguet. Did you know at that time that Mr. Hoguet was going to represent the purchaser of these patents?

A. At that time I don't know that a purchaser had been definitely arranged for. But I knew Mr. Hoguet was getting full credit for the seizure and would probably represent any interests who were interested in those patents.

Q. 67. Now, after you determined that the patent was enemy owned, subject to the limitation which you have stated, what did you do then?

THE COURT: I wonder if it would interrupt your examination if I would get him to explain his last answer, if it would not interrupt the course, I would like you to ask him why, at that point, because I do not understand his last answer at the place he stops.

Mr. Anderson: I would be very glad to, sir.

Q. 68. You stated, in your last answer, that it was understood that Mr. Hoguet was getting credit for the seizure. What period are you speaking of, the period of the early part of February, after the conference of the 27th?

A. Yes.

Mr. Kresel: That was not his whole answer, Colonel, and I doubt whether that was the part that the Court had reference to.

Mr. Anderson: I am leading up to try to get what the Court wants.

Q. 69. What did you mean by saying that you understood that Mr. Hoguet would represent the purchaser? State that to the Court, as far as you can.

A. Mr. Hoguet was a dollar-a-year man, and during that period had made various reports, and prior to that period had made various reports to the Custodian as to the patent assets of corporations in which the Custodian had seized a majority of the stock, and had been paid a fee for such investigations and such reports, and knowing Mr. Hoguet and his reputation somewhat at that time for charging fees, I had little idea that Mr. Hoguet was entirely moved by patriotic motives, devoting his time to such an investigation. There may have been various conferences between Mr. Hoguet and myself, as I saw him at least once a week and sometimes two or three times a week, that would have led me to believe that.

Mr. Kresel: Colonel, I did not quite get the witness, whether he said that Mr. Hoguet was or was not moved by patriotic motives. I did not quite get that.

The Witness: I stated that I did not believe that Mr. Hoguet was actuated entirely by patriotic motives to devote as much time as he did to the matter, for a dollar a year.

MR. KRESEL: I think, your Honor, that with the explanation which the witness has now made, it is quite apparent that his former statement, that he thought that probably Mr. Hoguet would represent the purchaser, was a mere speculation.

THE COURT: I think, Mr. Kresel, that must be left for eventual determination in determining the main issues of the cause, as to whether this testimony is of value, and if so, of what value.

Q. 70. I want to ask you one additional question —going back to your original conference with Mr. Hoguet, did Mr. Hoguet arrange in your presence for Messrs. Barrows and Squair to come down and assist you in this work?

A. I do not think that was arranged at the original conference, but possibly at the conference at the Alien Property Custodian's office.

Q. 71. You mean the conference of the 27th, of which the minutes have been presented?

A. I think that is the date. I know that Mr. Barrows—I understood at that time, Mr. Barrows would assist me, and whether Mr. Squair was assigned at that time or later, I do not remember.

Q. 72. Do you recall whether or not it was agreed at the conference of the 27th that there should be a sale of these patents, chemical and dye patents, to a corporation to be formed, representing the dye industry.

MR. KRESEL: One minute, please. I object to that, certainly, as calling for a conclusion.

THE COURT: Will you reframe your question, Colonel Anderson? If you agree, will you kindly reframe your question? If not, I will hear you.

MR. ANDERSON: With the Court's permission, I will scratch the question and start again.

Q. 73. Do you know whether or not there was a

discussion at the conference of the 27th of the selling of these patents to a corporation to be formed by the dye industry as represented at that meeting?

MR. KRESEL: If your Honor please, I would suggest that, inasmuch as the stenographic report of that meeting is already in evidence, and inasmuch as this witness has stated that that substantially accords with his recollection of what took place, that this witness should not be permitted to state his conclusion, as to whether there was or was not an arrangement for a sale. If he has anything to add to the stenographic report, I take it, of course, that that is proper.

MR. ANDERSON: I think I can ask the witness what his recollection is at the conference that took place, at a conference at which both parties were represented; and the effect of that is for argument.

MR. KRESEL: I quite agree with the Colonel, that he has a right to ask this witness, notwithstanding the stenographic record, as to what took place, but I claim that he has no right to ask this witness to give his conclusions, if he asks this witness what conversation took place there, notwithstanding—

MR. ANDERSON: I asked whether there was a discussion; that is, whether a discussion took place.

MR. KRESEL: Pardon me?

MR. ANDERSON: I asked whether a discussion took place as to the sale of these patents. I did not ask him what the conclusion of the discussion was. I asked him whether there was a discussion of the sale.

THE COURT: May I ask, so as to understand the debate between counsel, is there anything in the minutes showing such discussion?

MR. ANDERSON: There is something in the minutes showing a discussion; yes, sir.

THE COURT: Then your inquiry is as to whether there was further discussion not reported in the minutes?

MR. ANDERSON: I will make it that way.

THE COURT: I am not trying to frame your question.

MR. ANDERSON: My inquiry is, I am trying to get the memory of this witness as far as I can get it. He may not remember it, all the incidents that led up to that. I am not asking for his conclusions. No man can tell what are the various incidents that lead to a mental conclusion. What I am trying to get is the best he can give us.

THE COURT: May I have the question? (Q. 73 repeated as recorded.)

MR. KRESEL: You see, your Honor, this is a first step no doubt that there will be a questioning of the witness on this, but upon its face it calls for this witness's conclusion as to whether the conversations looked toward the sale to this particular corporation. Of course, if it bears upon anything that this witness knows in addition to what appears in the stenographic report, he has a right to say it. But then he must take the conversation.

THE COURT: I am wondering this, Mr. Kresel, if that question is not put in the form necessary to direct the witness's attention to the particular subject matter sought to be inquired about by counsel. Now, then, if he said "yes" to that question, by itself, and stops there, of course it is practical and valuable, I assume; but I assume that your purpose is to ask him another question. That is, to have the witness tell us what the facts are; and this question is merely for the purpose

of directing the witness's attention to the particular matters you want to inquire about. Am I wrong or right?

MR. ANDERSON: You are right, if your Honor please. I can make it clearer. I am trying to shorten it. I could ask a more technical question, but here is the idea: I am examining this witness as to matters that happened four years ago. I am not even handing him the papers to refresh his memory. I ask him about how he reached the conclusion that Mr. Hoguet was to represent the purchaser at this sale. I am taking him over the question of his memory of what took place, to the end that we may know all his knowledge of the situation.

THE COURT: Now then, I think in the Eibel case, a patent case recently decided by the Supreme Court of the United States, in an opinion written by Mr. Justice Taft, it seems to me he pointed out in that case the danger of the witness drawing on his unaided recollection through a long period of years.

It seems to me that if this witness is asked to give his conclusions with respect to transactions or conversations happening years ago, it would have the double iniquity not only of his being asked for conclusions, but being asked for conclusions as to things happening many years ago; and I think in those cases we must not have his conclusions, particularly more so than if it were an occurrence of yesterday. So I do not believe the fact that you are inquiring about the transactions of years ago will justify the witness in giving conclusions rather than facts. Now, it may be that I have misunderstood you.

MR. ANDERSON: It is so immaterial, if your Honor please, that to shorten it, I will accept your

Honor's ruling and the objection to the question is sustained. That is the easiest way to get about it.

Q. 74. Mr. Gordon, when you were interrupted, I was asking you about the question of what you did after these lists were furnished you by Messrs. Barrows and Squair in the method which you have described. You testified, as I recall, in effect, that you then made an abstract or title examination of the patents and ascertained whether subject to the limitations you have explained, they were enemy-owned. Then after you ascertained that, what did you do?

A. I had a corps of stenographers and typists to prepare reports and demands or seizures, as they were called.

Q. 75. To whom did you submit those demands for approval?

A. Mr. Hoguet came down about once a week and initialed each one with the initials R. H. and they were then submitted to the Custodian for signature.

Q. 76. And the Custodian would sign them?

A. That is correct.

Q. 77. When he signed them they were returned to you?

A. Well, they went through the Division of Patents at the Custodian's office for proper records to be made and they were then returned to me.

Q. 78. Then what did you do next?

A. (continuing). For service upon the Commissioner of Patents to be recorded.

Q. 79. And when served upon the Commissioner of Patents and recorded, seizure was regarded as complete, is that true?

A. That is true.

Q. 80. Was the proceeding which you have outlined, beginning with the selections of Messrs. Barrows and Squair and going through the proceeding in-

dicated—was that procedure followed with respect to the seizure of all of these patents and other rights included in what you call the sale of 4,500 patents?

A. That was followed in the first sale in so far as the patents were concerned. I believe there were certain copyrights that were reported by a Mr. Evarts who was employed by Mr. Hoguet's firm; and in addition to the patent rights, if any contractual interest was seized, such seizures were based on reports made to the Custodian and probably I attended to that without the assistance of either Mr. Barrows or Mr. Squair.

Q. 81. Was that done by Mr. Evarts at your suggestion?

A. No, only the copyrights by Mr. Evarts.

Q. 82. The copyrights were handled by Mr. Evarts?

A. The contractual rights seized was done by me at Mr. Hoguet's direction.

Q. 83. If I understand you correctly, and I am not mistaken, all of these proceedings taken by you were under Mr. Hoguet's direction?

A. That is true.

Q. 84. Going back a little, you spoke of a conference with Mr. Garvan on the day following the first conference you had with Mr. Hoguet, at which, with Mr. Hoguet, you reported the result of the conference on the day before. Was there at this conference with Mr. Garvan any discussion of the question of the number of patents to be seized?

A. Yes, it was estimated that within the limited time in which the investigation would have to be made, approximately 1,500 patents might be seized.

Q. 85. Would you explain a little more fully what you meant by the "limited time within which the seizure had to be made?"

A. Well, the President was then in France and

we were expecting every day that word would be received that no further seizures of enemy property could be made; and the rush was occasioned on account of that fact and the fact that we wanted to get all seizures made prior to the time the seizures were stopped.

Q. 86. Were seizures, so far as you know, ever stopped?

A. Not while I was with the Custodian's office, that I remember.

Q. 87. It is alleged in the Bill in this case that arrangements were made to keep the Patent Office open and the work was done night and day and Sunday; is that correct?

A. That is true.

Q. 88. Did you work your force at night hours and Sunday shifts also in order to secure these patents?

A. That is true. In fact, I had two forces, Colonel, one as a day force and another as a night force.

Q. 89. Were you doing that on the instructions of Mr. Hoguet or Mr. Garvan or whom?

A. Under the instructions of Mr. Hoguet.

Q. 90. Did Mr. Hoguet tell you why it was necessary to do this work in such a hurried manner?

A. I do not recall Mr. Hoguet's direct statement to that effect, but from a general discussion with respect to the patent investigation, I know that that was the reason for the rush. I do not remember definitely what Mr. Hoguet said with regard to the rush, but I know that that was a reason for it.

Q. 91. Did you endeavor to make the seizure a *fait accompli* before the return of the President in March?

A. I endeavored to get all seizures possible before the President returned. In fact, I remember specifically now Mr. Hoguet's statement to the effect that

rather than ask permission to do a certain thing, if we could show that the thing had already been done, there would be more likelihood of its being approved.

Q. 92. How did you get people into the Patent Office at night and Sundays?

A. By employing the Chief of the Assignment Division and his assistant as abstractors and explaining to the Commissioner that their work would be confined to night and Sunday work, and one of them as a representative of the Patent Office would be present at all times while others were working there.

Q. 93. Who were these two persons that you employed?

A. Mr. McGruder as Chief of the Assignment Division and Mr. Mulvey as his assistant.

Q. 94. Did these gentlemen occupy those positions at that time?

A. They did at that time and still are.

Q. 95. Did you employ these two officers of the Government to assist you in making this search?

A. I did, but their work was confined to after office hours; in other words, after 4.30, when the Patent Office was closed, so far as their official duties were concerned.

Q. 96. Do you recall what you paid them?

A. Four dollars an hour.

Q. 97. From what funds did you pay this amount?

A. From the funds furnished me initially by Mr. Poucher, and subsequently by Mr. Danner, who was an officer of the Dyes Institute, either Secretary or Treasurer.

Q. 98. Do you recall the aggregate amount of funds furnished you by Mr. Poucher and Mr. Danner?

A. I do not, but they have receipts for the entire amount. It was all paid by check and the check in itself was a receipt.

Q. 99. And you kept all that money in a separate

account in your own name as agent, and paid these various expenses as the work progressed from that fund?

A. That is true.

Q. 100. And among other expenses you paid Mr. Mulvey and Mr. McGruder for their work after office hours and at nights and on Sundays in abstracting to aid in the completion of the work which you have outlined?

A. That is true.

Q. 101. By this arrangement, then, as I understand it, you had access to the Patent Office both at night and on Sundays?

A. That is true.

Q. 102. Did Mr. Barrows and Mr. Squair have access to the Patent Office during those extra hours also?

A. They did, but their work was not actually in the Patent Office. They worked in an office in the McGill Building.

Q. 103. Were they in the Patent Office at those hours on Sundays and at night?

MR. KRESEL: If he knows.

MR. ANDERSON: If you know.

A. There probably were times, but I cannot state that definitely.

Q. 104. It appears in the Exhibit G with the Bill of Complaint in this cause that there are listed as having been seized and sold to the defendant Chemical Foundation various patents such as aeroplane propellers and mechanical appliances and electric boat appliances and other things of that kind which have no apparent connection with the chemical or dye industry. Could you say how it came about that those patents were included in that list?

MR. KRESEL: If he knows.

MR. ANDERSON: Yes, of course, if he knows.

I said, could you say. Of course, he would not answer if he did not know.

A. Yes. At a conference in the New York office of the Alien Property Custodian at which Mr. Hoguet and Mr. Garvan and Mr. Choate and one of the members of Mr. Barrows' firm, I believe Mr. Pennie, and —oh, fifteen or twenty other gentlemen attended—the question of what is chemistry and its allied industries and what patents would relate to the allied industries was discussed, and I remember Mr. Pennie or whichever member of Mr. Barrows' firm was there, stating that they were in a receptive mood and that chemistry or its allied industry covered practically everything under the sun, and for that reason I did not pay any attention to eliminating any patents, seizure of which was suggested.

Q. 105. Suggested by whom?

A. By Mr. Barrows or Mr. Squair or anyone else interested in the work, Mr. Hoguet or——

Q. 106. These men were then in a receptive mood and you proceeded on that theory, did you?

A. Yes.

Mr. Kresel: I object to the theory upon which he proceeded.

The Court: I will take the answer and let you have an exception, Mr. Kresel.

Q. 107. Did you not in fact know, Mr. Gordon, that during the entire period that you were working on this matter all these patents were going to be transferred to this corporation to be formed afterwards, known as The Chemical Foundation?

Mr. Kresel: Pardon me a minute. Your Honor will see that it is becoming important as to when this witness had the knowledge. During the entire period, as the question is, is too broad; it does not give us any information.

Mr. Anderson: I will limit it, between the

period of the conference of the 27th of January or the period of the 4th of February, when you first began this work, and the time it was concluded as to the seizure of the original list of forty-five hundred patents.

Q. 108. Didn't you know that all those patents were in fact to be sold to the corporation to be formed, which was afterwards called The Chemical Foundation?

MR. KRESEL: Preliminary to that, it does not yet appear when he finished this work on the forty-five hundred patents, Colonel.

MR. ANDERSON: I thought he testified that it was finished in about three weeks.

MR. KRESEL: I do not recall that testimony.

MR. ANDERSON: I may be mistaken.

MR. KRESEL: I do not recall that testimony.

MR. ANDERSON: The evidence shows that. Mr. Barrows' letter shows it.

THE COURT: You withdraw the question?

MR. ANDERSON: But I withdraw that question and strike it out.

Q. 109. About when did you conclude the work of listing and seizing these original forty-five hundred patents, approximately, that were sold at the first sale to The Chemical Foundation?

MR. KRESEL: Of course, the witness has not said anything about a first sale of the forty-five hundred patents. You see, you put that in your question, Colonel.

MR. ANDERSON: I beg your pardon.

MR. KRESEL: I do not want to keep objecting to your questions, but you are including in them things which are not in evidence either by this witness or by anybody else.

MR. ANDERSON: If your Honor please, I will agree that the sale to The Chemical Foundation of

the forty-five hundred patents—the list of patents is not in evidence yet, and I spoke to Mr. Kresel on that subject a moment ago; we are going to put it in in a very short time, and it has all been stipulated. Therefore, I did not want to interrupt to put it in now. I understood the witness to say that he concluded the work of the original seizure of those originally sold in the first sale to The Chemical Foundation earlier in his testimony, embracing about forty-five hundred patents, and that he made those seizures upon lists, exclusively upon lists, furnished by Messrs. Barrows and Squair. Now I am asking him about this list which he says concluded the work as to the original sale, and I did not say anything about the date of the sale because I was going to show that later by the evidence.

THE COURT: Now let me have the question.

(The stenographer then read Q. 109 as recorded above.)

THE COURT: Can't you eliminate the difficulty? I do not remember whether he said that in his direct testimony or not, but, as I understand it, your objection would be met by eliminating the number of patents.

MR. KRESEL: Yes, and by the sale to The Chemical Foundation. I think if it is confined to the question of the seizure of the first batch of patents, which he says, that would be sufficient.

MR. ANDERSON: He said originally that was forty-five hundred in round numbers, you know.

MR. KRESEL: I do not even recall that.

MR. ANDERSON: He did say that.

MR. KRESEL: Perhaps my memory may be at fault, but I do not recall the witness putting the limit at 4,500. Did you, Mr. Gordon?

MR. ANDERSON: I will ask the witness this, then:

Q. 110. Did you not state in your earlier testimony that the original list of patents seized by you in the method described was about forty-five hundred?

A. Yes.

MR. ANDERSON: It was certainly clear in my mind.

Q. 111. When was the work of the seizing of that original list of patents completed, approximately?

A. I think it required longer than three weeks to complete the seizure, but I do not remember exactly the time that that required.

Q. 112. I hand you herewith a letter dated February 28, 1919, addressed to Mr. H. E. Danner, Treasurer of the American Dyes Institute, and ask you if you can identify that letter as written by you (handing witness)?

MR. ANDERSON: There is no necessity for it; because it was stipulated.

A. Yes, I can identify that. I wrote that letter to Mr. Danner making my report of the work accomplished up to that time.

MR. ANDERSON: In order to remove any more apprehension, I ask leave to read this letter?

MR. KRESEL: Do you offer it now?

MR. ANDERSON: All right, I offer in evidence the letter dated February 28, 1919, identified by the witness as having been written by him to H. E. Danner, Treasurer of the American Dyes Institute, and identified as Plaintiff's Exhibit No. ——

MR. KRESEL: May I see it?

MR. ANDERSON: I beg your pardon, I thought you knew all about it. It was stipulated.

MR. KRESEL: I do not recall which one this is (taking paper from counsel).

THE WITNESS: Colonel, may I correct that last answer? I did not notice whether that was the original or a copy, but I did glance at the substance of it and I remember writing such a letter.

MR. ANDERSON: I may state to your Honor we have stipulated the authenticity, and that these letters were sent and received, and I merely wanted to refresh the witness's memory by it.

THE COURT: As I understand it, the witness wants to inspect the letter again and see whether he did in fact sign it.

THE WITNESS (taking paper): Just whether it is an original or a copy. This seems to be a carbon, but I well remember the letter and know that I wrote the original.

MR. ANDERSON: I will state to the Court the original is not now in our possession, and this has been stipulated in its stead.

THE COURT: The letter is admitted without objection. Mr. Kresel, does the general objection apply to this or not?

MR. KRESEL: Yes, your Honor.

THE COURT: Then admitted under the conditions of the exhibit last week.

Received in evidence and marked "Plaintiff's Exhibit No. 65." (*See Exhibits, Vol. I, page 240.*)

MR. ANDERSON: I ask leave to read this very briefly, or part of it. It is addressed to Mr. Danner by the witness and dated February 28, 1919.

THE COURT: February what?

MR. ANDERSON: February 28th, 1919. (Reads from Exhibit 65.) May I amend the offer so as to include those schedules in the letter?

MR. KRESEL: Yes, quite right. I understand the schedules which are attached to the letter go with the letter.

MR. ANDERSON: Yes, that is all right. (Continues reading Exhibit 65.)

Q. 113. Now, Mr. Gordon, you refer in this letter to the fact that the amount of work had been very far in excess of that anticipated, and that the maximum amount of patents which it was expected would be seized was two thousand, including the Badische patents. From whom did you derive the information as to the number of patents expected to be seized, or from what source?

A. I believe that was discussed the first time I met Mr. Hoguet, in January, or shortly after then, as to the possible amount of work that could be accomplished in a very few weeks' time.

Q. 114. Why was the work limited to be a very few weeks' time?

A. Because they expected any day that the Custodian's right of seizure would be stopped.

Q. 115. Then, it was not known at any time between February 4th, when you began this work, and the time of this report, how many patents you would actually be able to seize for sale?

A. No, it was not; it was not known.

Q. 116. Did you continue to seize patents even after this report was made?

A. For quite a while after.

Q. 117. So that even at the time this report was made, you did not know how many patents would be seized?

A. In addition to that number, no.

Q. 118. The work was still in progress?

A. Yes.

Q. 119. At no time during the month of February, could you form any definite estimate of the number of patents you would be able to seize during the time it was expected that the work was to go on?

A. No.

Q. 120. You stated, I think, earlier in your testimony that you originally estimated that you could seize about 1,500?

A. No, that was the estimate that could be seized in a period of a few weeks. It may have been 2,000. 1,500 or 2,000.

Q. 121. And as a matter of fact, you state in this letter, that the estimate on which you based the work originally was 2,000 patents, including the Badische; is that right?

A. That would have made my original estimate of 1,500 right, because we did not have to abstract the Badische patents. That left 1,500 that we did abstract.

Q. 122. You spoke here of moving back to the Alien Property Custodian's office. You were in the employ of the Alien Property Custodian all the time that you were doing this work, were you not?

A. Yes.

Q. 123. How did it come that you were reporting to Mr. Danner on your work?

A. Well, Danner was paying for it.

Q. 124. Did you receive any instructions from Mr. Hoguet to report to Mr. Danner what you did?

A. I do not remember whether Mr. Hoguet instructed me to report to Mr. Danner or whether Mr. Danner asked me to report to him, or whether I did it voluntarily in order to get those bills paid up and additional funds for any other work that was necessary.

Q. 125. Where did you have your office doing this work?

A. In the Washington Loan & Trust Building, for convenience, as it was right across the street from the Patent Office.

Q. 126. Then you did not conduct this work, although you were the representative of the Alien Prop-

erty Custodian, you did not do this work from his office at all?

A. No.

Q. 127. And the expense of the office down there was a part of the expense that you paid out of the money advanced by Mr. Danner?

A. That is true.

Q. 128. After you moved back, as you said you would do "tomorrow" in this letter—that is, it would be the first of March—after you moved back to the Alien Property Custodian's office you continued the work along the same lines, did you, after the first of March?

A. Yes; for some time, but I do not remember just how long. There were subsequent seizures made, and a great many of the abstracts of title to subsequent seizures were made by me personally.

Q. 129. Mr. Gordon, how did you happen to come to draw on Mr. Poucher for the original $500; had you ever met Mr. Poucher?

A. Yes, I had met him once or twice in the Custodian's Office. I do not remember now whether in the Custodian's office in New York or not, but I was instructed to draw on him by Mr. Hoguet.

Q. 130. Did you see him during the progress of this work at all?

MR. KRESEL: See whom, Hoguet?

MR. ANDERSON: Mr. Poucher.

A. Yes, I think he was in Washington several times, and I cannot remember just the dates that I saw him, but I saw him in the Custodian's Office several times, I know.

Q. 131. Did you ever discuss this work with him while it was in progress?

A. Not in detail, but he knew, of course, what I was doing from my first letter to him for funds to cover initial expenses.

Q. 132. You knew that Mr. Poucher was a member of the Special Committee of the American Dyes Institute that attended this conference?

A. I did.

Q. 133. And that Mr. Danner was Secretary of the American Dyes Institute, or Treasurer?

A. I did not at that time, but later I was instructed by Mr. Poucher, if I remember, to draw on Mr. Danner for subsequent expenses.

Q. 134. I hand you a letter, dated February 6, 1919, addressed to you and signed by "M. R. Poucher, Chairman of Committee American Dyes Institute." Will you say whether you received that letter?

A. Yes, I received that letter.

Q. 135. Do you recognize Mr. Poucher's signature there?

A. No; I can't say that I ever saw his signature on more than probably two or three letters; it may or may not have been signed by him.

MR. KRESEL: There is no question of the authenticity of it.

MR. ANDERSON: The authenticity is admitted anyhow. I only want to complete the identification.

I offer in evidence a letter dated February 6, 1919, addressed to Will T. Gordon, Director, Bureau of Investigation, Alien Property Custodian, signed "M. R. Poucher, Chairman of Committee American Dyes Institute," to be identified and read as "Plaintiff's Exhibit No.——

THE COURT: Admitted subject to general objection.

Received in evidence and marked "Plaintiff's Exhibit No. 66." *(See Exhibits, Vol. I, page 246.)*

MR. ANDERSON: The letter is as follows. (Reading.)

MR. ANDERSON: In view of the fact that this

correspondence is stipulated as to authenticity and receipt, I will not go through the form of showing it to the witness.

I now offer in evidence copy of a letter dated February 10, 1919, purporting to be from Mr. W. T. Gordon, though unsigned, to Mr. H. E. Danner, Secretary and Treasurer, American Dyes Institute. You will admit that was signed by Mr. Gordon, won't you, Mr. Kresel?

MR. KRESEL: Yes, no question about it.

THE COURT: Admitted subject to the general objection.

Received in evidence and marked "Plaintiff's Exhibit No. 67." (*See Exhibits, Vol. I, page 247.*)

(Mr. Anderson reads Plaintiff's Exhibit 67.)

Q. 136. I call your attention to the second paragraph of that letter which states that "Mr. Ramsay Hoguet was here last week and instructed me that our work must be completed in much less time than we at first contemplated." Do you recall whether Mr. Ramsay Hoguet stated the reasons why the work must be completed in much less time than at first contemplated, and if so, state what he said as far as you can recall?

A. I have nothing to refresh my memory on that point, Colonel. If I wrote it, it probably took place. I do not deny writing that letter at all, but what conversation Mr. Hoguet and I carried on at that time, I cannot recall. It is five years ago.

THE COURT: I was wondering if you will help me a little at this point, Colonel Anderson, so that I may weigh the testimony as it goes in as well as at the conclusion of the case. I am not sure whether I understand your contention in one particular. Is it your contention that the seizure as well as the sale was invalid?

MR. ANDERSON: No, sir. I am not attacking the title of the Government to these patents. I

do not claim at this time that the seizure was invalid. I do not know what the evidence may develop. But I do claim that the entire matter here set forth was a part of a general scheme to get control of these patents in a manner and for a purpose which we shall argue was illegal.

THE COURT: That helps me some. I was just wondering whether the testimony was offered for an underlying purpose of showing that the conspiracy, if established, would antedate the seizure and consequently invalidate the seizure as well as the sale or not.

MR. ANDERSON: I will not contend that because the Government is not going to attack its own title to these patents. But it will contend that this is evidence of a purpose in dealing with this subject by the representatives of the industry and evidence also of methods of dealing with this subject which, we shall point out in considerable detail when we come to analyze the evidence, will make the transaction of the sale invalid. Whether it will affect the title of the Government, I am not prepared to say, because the Government certainly is not going to attack its own title.

THE COURT: Now then, if you do not mind helping me further——

MR. ANDERSON: Not at all.

THE COURT: If you cannot answer these questions now, I will be very glad to have you say so. Assume just for the purposes of this question and for the immediate purpose of this question only that you should succeed in establishing your alleged conspiracy and that the alleged conspiracy antedates the seizure and that in the opinion of this or some other Court that a conspiracy was sufficient to set aside the seizure as well as the sale. Would the fact that the United States was

a party plaintiff here preclude the judicial department from a decree to that effect? Would the fact that you are the plaintiff prevent a decree to that effect?

MR. ANDERSON: If the sale itself was invalid?

THE COURT: If the seizure as well as the sale was invalid.

MR. ANDERSON: I have not considered that question, sir; and I frankly would not care to answer it, because naturally I do not know that the Government could be heard to attack the title under which it itself claims.

In my judgment, offhand, reserving the right to even modify this offhand statement, because I have not considered the effect on the seizure, desiring to be entirely frank as a matter of courtesy to the Court, it seems to me that the seizure of these patents, if taken by the Alien Property Custodian in pursuance of law, would vest in the Alien Property Custodian the title to the patents; and especially since that has been confirmed by treaties, no one under those treaties is in a position to attack the title of the United States to this property, because the treaties have recognized these acts.

But taking the seizure under the acts and the very broad powers of the acts, in connection with the Treaties of Versailles and Berlin, it would probably protect completely any title of the United States, even if it were shown that the circumstances leading up to the seizure were such as in a private transaction between persons might affect the validity of the act.

But if these transactions were all in pursuance of a purpose to obtain control of these patents, in which the seizure by the Government and vesting title in the Government was merely one

act, then the act of conveying title from the Government to the people who brought about this seizure in this manner, as a part of that purpose and of a larger purpose which I have outlined in my opening argument and will not re-state, would in itself be strong evidence as against the validity of the transfer as being not only affected by the circumstances which entered into the transaction taken as a whole, but by the purpose of the transaction.

It is very difficult for me to outline to your Honor fully what I regard as the bearing of this evidence without really stating at very considerable length what I believe to be the legal principles applicable; and I know your Honor does not want me to do that.

THE COURT: I do not want you to do that, but I was interested in this point of knowing whether your contention was two-fold or not.

MR. ANDERSON: We do not propose to attack our title to these patents. In other words, we will endeavor to maintain it at every cost.

MR. KRESEL: Will your Honor permit me a minute upon the question which you have raised?

THE COURT: Certainly.

MR. KRESEL: If your Honor please, the question that your Honor has raised is a question that has been in our minds for some time and was one of the grounds upon which our objectin to this line of testimony has been based, although not specifically urged.

I am rather surprised to hear Colonel Anderson now state that the Government does not claim that the seizure was invalid or illegal. I say that I am surprised at that, in view of the allegations of the Bill. Your Honor will find in the 22nd paragraph of the Bill the following statement:

(Page 22.)

> "That with the object and purpose of securing such control of said enemy-owned patents, copyrights, trade-marks, labels, and other similar rights and applications therefor, and for the purposes hereinbefore stated, said persons, firms, corporations, and trade associations and others associated with them in said industry and in the control and monopoly thereof conceived and entered into a scheme, combination, and conspiracy prior to or about November, 1918, to induce and procure the seizure of said enemy-owned patents, copyrights," and so on, "by the Alien Property Custodian."

Here we have a direct allegation that these alleged conspirators had, as one of the purposes of their conspiracy, the inducement of the Alien Property Custodian to make these very seizures. Your Honor will also find in subsequent paragraphs of the complaint that it is alleged that, pursuant to such conspiracy, they succeeded in inducing the Alien Property Custodian to make these seizures.

We had been proceeding upon the theory here that this evidence which they have been offering was in support of that allegation or those several allegations. I am not quite clear whether Colonel Anderson now desires to be relieved of these allegations in his Bill of Complaint, whether he now withdraws the charge that the seizure was induced by these conspirators who induced the Custodian to make the seizure in order to carry their conspiracy into effect.

It is quite evident, your Honor, as your Honor pointed out, that if the seizure was illegal, then this property could not possibly go back to the United States Government. There is no power in

the Government now to make any seizure; and if the original seizure was illegal and invalid, because tainted with conspiracy as alleged in this complaint, then these patents, if your Honor should decide that we were not entitled to them, could not possibly go back to the United States Government. They would then belong to the Germans, because there would then have been no legal seizure thereof. It would be inevitable. I can well understand why Colonel Anderson now seeks to withdraw from his allegations in the Bill, because he is too good a lawyer; he knows that the effect of any decision by this Court that the seizure was illegal would be that this property would go back to the Germans, as we claim it eventually will; and certainly it would make it impossible for your Honor to grant the relief which your Honor asks. Your Honor could not direct that this property go back to the Government.

THE COURT: The judicial power is purely a non-political one and it has nothing to do with international relations.

MR. KRESEL: True.

THE COURT: That is a matter for the legislative and Executive Departments and not for the Judicial Department.

MR. KRESEL: True.

THE COURT: So that if I understand Colonel Anderson's contention and your contention, you differ on this one point: I did not intend to raise any discussion. I was only asking for a little aid.

MR. KRESEL: I am very glad your Honor did raise that question.

THE COURT: My thought was this, that I wanted to know whether the purpose of the testimony was directed to the invalidity of the seizure as well as the sale, so that I might consider that

as we go along. But as I understand Colonel Anderson, he says that even though he may show and establish a conspiracy of the dye industry—let us call it that—about November, 1918, prior to the seizure, that the seizure was induced by the dye industry as a step in the conspiracy and the first real act of that conspiracy, yet the judicial decree here may not invalidate all the acts of that conspiracy but may invalidate only the consummating act of that conspiracy. While, as I understand your contention, Mr. Kresel, it is that if a conspiracy be established so as to invalidate one act resulting from that conspiracy, the judicial power has no authority or right or discretion to stop there, but must invalidate all acts leading up to the ultimate result.

MR. KRESEL: It would seem to me that would be the logical conclusion. May I have one other word?

THE COURT: Yes.

MR. KRESEL: In view of the statement of Colonel Anderson now that there is no claim on the part of the Government that the seizure was illegal or invalid, I now move to strike the testimony of this witness, upon the ground that upon the statement of counsel for the Government it becomes absolutely immaterial and irrelevant. If it be not for the purpose of proving the invalidity of the seizure, what materiality or competency or relevancy has it to show what this witness did, what reports he made to Mr. Danner, who it was that advanced the money necessary to pay the expenses? It is not denied that the act of seizure was the act of the Alien Property Custodian; it is not denied that the demands made for these patents were demands signed by the Alien Property Custodian. It is not denied that this gentleman

was an employee in the office of the Alien Property Custodian, and what he did he did for the Alien Property Custodian.

THE COURT: If I may ask one more question, and I am sorry to interrupt the taking of testimony long enough to get this help, but unless I get it as I go along it is going to be more difficult in the end. Do you contend if Colonel Anderson's contention with respect to the ratification of the seizures by International Treaties is sound, assuming that to be a fact, do you contend that that ratification would preclude Colonel Anderson from raising any contention as to invalidity of the sale; that is, the acts of the Dye Industry having been approved by the United States by its International Agreement, that thereby you could not go behind the seizure and you must then begin your evidence with respect to conspiracy after the seizure and merely during the interim between seizure and sale?

MR. KRESEL: My contention, your Honor, as to the Treaty is this—that the Treaty undertook to ratify, as I read it, all acts of the Alien Property Custodian in the seizure of property. Now, seizures were made by the Alien Property Custodian under the provisions with the Trading with the Enemy Act, under the direction of the President, and under rules and regulations approved by the President. Such direction and rules and regulations laid down a method of making a seizure. At the basis of a seizure there must be a determination of alien enemy status. My contention is that the Treaty did not and was not intended to ratify any seizure of property that was not in accordance with our Trading with the Enemy Act, and the direction and rules and regulations laid down by the President. And if it be a fact, as

claimed here, that these seizures were induced by these conspirators in order to carry out their purpose, it seems to me it must follow that such a seizure is invalid and illegal. It cannot possibly be made the basis of a legal act. How can this Court or how can the Government claim that one purpose of the conspiracy is valid and another purpose of the conspiracy is invalid?

MR. ANDERSON: It can ratify.

MR. KRESEL: Who can ratify an illegal act? How can the Government ratify an unlawful act? I understood Colonel Anderson himself to argue with respect to the ratification by the President of Mr. Polk's action, which is not said to be unlawful or criminal—they do not claim that, they claim it was unauthorized, and yet they claim that could not be ratified by the Government or by the President. Is it possible that the Government is now taking the position here, that notwithstanding this seizure was the result of an unlawful conspiracy, they nevertheless ratified that?

MR. ANDERSON: No, it does not.

MR. KRESEL: If that is the purpose of the Government, I should like to understand it. They either stand by their Bill of Complaint as we have read it, or they withdraw it. If they will now say that the seizure was perfectly lawful, well and good; but if they say that, then this evidence is immaterial and irrelevant. They cannot blow hot and cold here. They cannot seek to bind us by testimony of this gentleman and various documents and interviews and correspondence between the Dyes Institute and this gentleman representing the Alien Property Custodian if it has no materiality in the case. If it is not for the purpose of showing that the seizure was made pursuant

to this conspiracy, what is the purpose of this testimony?

MR. ANDERSON: If your Honor please, I will answer Mr. Kresel now on his various points very briefly; because if we are going to argue this question before we get through the case we will be arguing all the week.

THE COURT: I did not intend that.

MR. ANDERSON: Your Honor did not intend that—I know it. In the first place, Mr. Kresel has referred in a number of instances to my withdrawing from a certain position or not standing by a certain position. I want to repeat what I have already said, that the Government except to the extent that it has applied for formal amendments, absolutely stands by and will try this case upon every allegation in this Bill, without any modification whatever. And it does not withdraw any position. Distinguished counsel and myself may take different views as to the meaning of a Bill, but as we understand the Bill we stand by its allegations without the slightest change of any kind, and that applies to this entire trial unless we formally on the record take a different position. So that I hope that will not be the subject of any further discussion.

This Twenty-second Paragraph of the Bill, Mr. Kresel did not read it all, and reading down to a comma rarely expresses the intention of the draftsman. It is on page 22:

> "That with the object and purpose of securing such control of said enemy-owned patents, copyrights, trade-marks, labels, and other similar rights and applications therefor,"——

that was for the purpose of requiring these things for their ends——

> "said persons, firms, corporations, and trade associations and others associated with them in said industry and in the control and monopoly thereof conceived and entered into a scheme, combination, and conspiracy prior to or about November, 1918, to induce and procure the seizure of said enemy-owned patents, copyrights, trade-marks, labels and other similar rights and applications therefor by the Alien Property Custodian, and the sale, transfer, and assignment thereof by said Alien Property Custodian to themselves or to some corporation, agency, or institution controlled by them."

The seizure was only one of the steps. In what? In the effort to obtain control. The seizure as between the original owner, the enemy-owner so-called, and the Government of the United States, may have been an entirely legal act as between those two. And nobody can raise the question as to the legality of the seizure except the enemy owners or the Government of the United States. Certain this defendant, claiming under title from the Government of the United States, can not raise the question of the validity of that seizure. Therefore, it cannot be involved in this case as affecting the title of the United States, because that can only be raised by the person who has an interest in it in a judicial proceeding, who has a case to present on it, and he can not present it for two reasons: First, as against him the formal requirements of the Statute were followed; second, if there had been any question about it, the Treaty ratifies a seizure and the acts of the Alien Property Custodian in making the seizure.

And it also, so far as the German owners were concerned and the Government of Germany was concerned, ratifies all acts of the Alien Property

Custodian in making sales of property in pursuance of law; that is, a legal sale. Therefore, so far—

THE COURT: Will you not tell me that again? It ratified all—what does?

MR. ANDERSON: The Treaty of Berlin. The Treaty is as much a law, of course, as the Constitution or the Statutes.

THE COURT: Yes.

MR. ANDERSON: Of course, your Honor, it had to do with the international relationships, but the Treaty is a law.

THE COURT: Of course.

MR. ANDERSON: Therefore, so far as the Government of the United States is concerned, even if there had been a power in the alien enemy, who is the only person who had that power, to question the title of the United States to these patents, the Government by contract with Germany and including an agreement on the part of Germany to reimburse its nationals for the property so taken as a part of the consideration for the Treaty, has completely, so far as the United States is concerned vested the title in the United States by those acts.

Now therefore, we have the title in the United States. Anybody can not raise that question of title. The Courts have held in these various cases here that where the persons, the owners of the patents, undertake to sue for an infringement in an injunction case, that the United States was the only one that could raise that question.

Judge Hand said it directly.

THE COURT: The only one that could raise the question of what?

MR. ANDERSON: That could raise the question of whether there was an infringement of the pat-

ent that had been seized, don't you see? That is, the German owner was no longer the owner; the patent was no longer owned or controlled by him within the meaning of the Act, since it had been seized by the Government of the United States, and that seizure had been affirmed and confirmed by treaty; therefore he had no position or standing in Court to question the use of that patent; whatever might be the rights of the United States against the person who is using the patent.

Now, that is as to injunction. Now, so far, we have the title in the United States. The United States could have brought this suit if it had not any interest—property interest—in these patents; and could have obtained this decree if it had not had any property interest in the patents.

In the Beebe case and other cases, the Supreme Court has held that where the United States owes a public duty to the people of the United States to sue, although the effect of the suit may be to vest title in somebody else, they can maintain the suit in discharge of that public duty. There is no controversy on that subject in this country, because this duty to the people is as necessary to the protection of the interests of those people and the property rights of those people, and the Courts sit to enforce both.

Now, in the next place, the allegations of this Bill taken together lead to this conclusion, whether it is a sound conclusion will be for the Court to determine when we get to argue the question—that these gentlemen, conceiving it to be the interest of the dye industry to get control of these patens, which we think now has been proven beyond question by their own documents, went to work to carry out a scheme to get control of them; that in pursuance of that scheme they went further and

become the active agencies in bringing about their seizure. Now, if they stopped with the seizure, although they might have been the active agencies inducing it and bringing it about, yet they would have secured no benefit, and therefore the seizure would have been valid. They might have been mistaken in their judgment, but the seizure would have been valid; Germany would have been divested, and if it had stopped there, the Government would have had no cause to complain except perhaps if there had been evidence of the violation of duty toward the Government, such a transaction might have been brought within the civil or criminal statutes; but I am not discussing that aspect of the case here, and it is not involved in this cause. Here they did not stop. The seizure was only one of the steps in securing that title, in securing the patents for themselves. They could not get them any other way. Therefore, if as is charged, they induced the Alien Property Custodian to seize the patents and immediately to convey them to him, and in fact the seizure was made for the purpose of making that conveyance, there might have been a good title as between Germany and the Government vested in the United States, especially when that title was confirmed by subsequent treaty, made two years after, but the history and circumstances leading up not to the seizure as the final and culminating act, but to the question of title by the parties who were doing these things, or causing them to be done in their interest, in which the seizure was only one step, becomes relevant to the question whether that transaction is one which a Court of Equity will sustain against the Government of the United States.

Now, in its larger aspects, which I have in-

dicated in my argument, because I do not want to go into it fully, it involves also the question of whether a transaction developed through such a combination of conspiracy as here intended, as here obviously intended, to acquire control of the foreign commerce of the United States, and monopolize a business of the United States, is invalid and the act can constitute a legal basis for a contract which the Courts can sustain. Of course, that is a very much larger question, a very involved question and one which I have not argued except to state it, and one I would not argue, because it will take a day. Now, that question and all that evidence makes this evidence especially relevant, and the law of conspiracy, if there is one law that allows you to introduce almost anything that relates to any part of the transactions of the parties, it is the law of conspiracy, on the criminal side, and on the civil side it is even more lax.

Now, in the second place, a conspiracy to require a lawful act to be done—that is the seizure—is not essentially actionable in itself, but if the acts of the parties who were the parties to that transaction are such as to indicate, develop and show a purpose to secure the doing of a lawful act, as one of the essential steps in the ultimate accomplishment of the unlawful purpose, then all those steps leading up, while it might not affect the lawful act, might affect the ultimate purpose and the ultimate transaction which had been involved.

All of those circumstances lead me to conclude, and I do not see how I can get out of it, that this evidence is clearly admissible and is of the very essence of the *res gestae* in this cause, on this phase of the case.

THE COURT: Colonel Anderson, do not let me get you into any further discussion, because we will have to decide this on the testimony and the record eventually and not by argument; and it is no concern of mine, or the Judicial Department as I understand it, where the chips fall. The question is what is the right and law of the matter; but it is essential that an opinion be filed or at least it is the practice. In supporting a contention—let us assume for a moment—or in supporting a conclusion that you have established a conspiracy, if that should be the conclusion—I have no thought now as to whether it will be or not until I have heard the case——

MR. ANDERSON: Certainly.

THE COURT: But it would then be essential to show, if this evidence is convincing, that the conspiracy antedated the seizure. That is all of the question.

MR. KRESEL: Would your Honor care to hear anything about this Junkers case, that Mr. Anderson mentioned?

THE COURT: I think not, Mr. Kresel. Thank you very much. I think I have generally both your contention and Colonel Anderson's, and that is all I wanted to know. I merely wanted to know his contention and not particularly his reasons for it as to whether or not you are going to contend that not only the sale but the seizure as well is involved.

MR. ANDERSON: I would not have given any reason, except in response to the argument of counsel.

MR. KRESEL: I move for the striking of the testimony. I take it, your Honor, that your Honor denies that motion?

THE COURT: Yes. And if you desire, you

may include this among your general reasons for contending that testimony is irrelevant and immaterial or otherwise objectionable.

MR. KRESEL: I would like to have that privilege, your Honor.

THE COURT: Very well.

Q. 137. Now, Mr. Gordon, going back to a question I asked awhile ago, did you not at the time that you were working on this matter of the seizure of these patents, subsequent to February 4th or 5th, and prior to March 1st, know that these patents were being seized to be sold to a corporation formed or to be formed which was afterwards called the Chemical Foundation, Incorporated?

MR. KRESEL: To that, your Honor, we object, as immaterial and irrelevant, as to whether he knew that. It does not make any difference whether he knew it or not.

MR. ANDERSON: It makes a very decided difference.

THE COURT: In view of the argument just had, I am not sure if it does not make some difference, if that is decided in favor of one or the other.

MR. ANDERSON: I understand that all this is subject to his objection.

THE COURT: He is raising another objection, a minor one to be sure, that it is immaterial as to whether this man knew it or did not know it, and I am not sure whether Colonel Anderson's arguments may be sound, whether it is immaterial.

MR. KRESEL: The point I have is this: If this witness were alleged to be one of the conspirators —you will pardon me for making that assumption, Mr. Gordon—I can quite see the purpose, under the theory of the Government, the fact that he knew that the sale was intended to The Chemical

Foundation might have influenced his official action. That is not his claim here, nor is there any claim that his official action was influenced by the knowledge we will assume that he had, that it was intended to sell these patents to the Chemical Foundation.

Now, if that is the fact, why is it relevant or material as to whether he knew that it was——

THE COURT: I will have his answer.

A. He was. I know Mr. Hoguet proceeded to sell those patents to a corporation. My first knowledge of Hoguet's idea was at my original meeting with him, about the 1st of January. At that time I believe he suggested a name as American Patents, Incorporated; and then at a subsequent time the name of the Chemical Foundation was finally decided on, and at the meeting in the Alien Property Custodian's office, at which time the minutes he referred to awhile back——

Q. 138. The 27th of January, 1919?

A. Were written; I do not know whether the name of the corporation was discussed at that time, and others, but it was generally understood that if the sale could be made and approved, that it would vest title to those patents in a corporation.

Q. 139. It appears in the evidence here that the Chemical Foundation was incorporated on the 19th of February, 1919. Did you know in the latter part of February, when you made this report to Mr. Danner, that the sale would be to that corporation?

MR. KRESEL: Same objection, your Honor.

A. I attended a meeting——

MR. KRESEL: I ask for an answer yes or no, if your Honor please.

MR. ANDERSON: I think he can answer that question, and explain.

MR. KRESEL: I would like to have the question read.

THE COURT: The rule here is he must answer yes or no to such inquiries, and then if he needs to add a modification, if it needs a modification or explanation, he can follow with that.

MR. ANDERSON: Answer the question first, and then if you want to add any explanation, you may.

THE WITNESS: Will the stenographer please repeat the question?

(Question 139 repeated as recorded.)

A. I knew if the sale was made at all, it would be made to that corporation.

MR. KRESEL: I ask that the answer be stricken out, your Honor, as not responsive.

THE COURT: Do you think that is responsive?

MR. ANDERSON: I do, sir, because he could not say if the sale would be made at all.

THE COURT: Let the answer remain.

MR. ANDERSON: Apparently, he did not know the transaction.

Q. 140. Had you heard Mr. Hoguet state that the sale would be made to The Chemical Foundation, Incorporated; and if so, about when and where?

MR. KRESEL: I object to that as leading.

THE COURT: It is leading. If it is objected to as leading, you had better modify it, notwithstanding I think there is no merit.

MR. ANDERSON: I will put two questions.

Q. 141. Had you heard Mr. Hoguet make any statement as to the sale being made to The Chemical Foundation after its incorporation?

A. Yes, a great many statements, particularly with reference——

MR. KRESEL: One minute. I object to that. The witness has answered the question "yes."

MR. ANDERSON: All right, I will ask another question.

Q. 142. Please state what those statements were?

MR. KRESEL: I would like to know when, and have the time fixed.

Q. 143. And approximately when and where, and who was present; let us get those?

A. I cannot quote exactly Mr. Hoguet's statements made five years ago from memory, but being his direct assistant, he made many statements to me relative to "putting the thing over," I believe was an expression I can remember that he used; and as to the probability of the sale being made and whether or not it would be approved——

MR. KRESEL: Just a moment, pardon me.

THE WITNESS: ——he always being optimistic to the effect that it would be approved. Just the exact statements I cannot remember.

MR. KRESEL: One moment.

THE COURT (to witness): You ought to know that you should not answer against opposing counsel when he is making an objection. I will allow that to pass, and we will strike out the last statement. Will the stenographer kindly repeat that last part. (Answer repeated as recorded.)

Stop with "and whether or not it would be approved." I believe that is the part where the objection was made. Now, read the balance, so that we may see that we have it right.

(Latter part of answer repeated, as follows: "He always being optimistic to the effect that it would be approved. Just the exact statements I cannot remember.")

THE COURT: Strike that part out. He is merely giving now his impressions from the statement.

MR. ANDERSON: I quite agree, the part about being optimistic is a conclusion rather than Mr. Hoguet's statement. The first part of the answer stands, your Honor, as I understand it?

THE COURT: Yes.

Q. 144. Did Mr. Hoguet ever discuss with you the matter of getting the approval of the sale by Executive order; do you recall; now speaking of the time in February that we are now discussing?

A. From memory I cannot recall the dates, but I do remember Mr. Hoguet stating that Mr. Palmer would present the matter to Mr. Polk for approval.

Q. 145. That is all you remember about that, is it?—I do not think I want to ask that general question. Strike it out, because it is too general.

MR. ANDERSON: Now, without taking time for identification, I will offer in evidence a letter dated February 16, 1919, from Mr. Ramsay Hoguet to Mr. Will T. Gordon, Bureau of Investigation, office of the Alien Property Custodian, and ask that the same be identified as "Plaintiff's Exhibit No. 68."

THE COURT: Admitted.

Received in evidence and marked "Plaintiff's Exhibit No. 68." *(See Exhibits, Vol. I, page 248.)*

MR. KRESEL: Admitted subject to the same objection?

THE COURT: The same general objections, as were all exhibits last week.

MR. ANDERSON: That is understood.

THE COURT: Yes.

(Mr. Anderson reads from Plaintiff's Exhibit 68.)

MR. ANDERSON: I offer in evidence letter dated February 19, 1919, from H. E. Danner, Secretary American Dyes Institute, to Mr. Will T. Gordon.

THE COURT: Admitted.

Received in evidence and marked "Plaintiff's Exhibit No. 69." *(See Exhibits, Vol. I, page 249.)*

(Mr. Anderson reads Plaintiff's Exhibit No. 69.)

MR. ANDERSON: I offer in evidence a letter dated February 28, 1919, from Ramsay Hoguet to Will T. Gordon, to be identified as Plaintiff's Exhibit No. 70, together with the memorandum attached, referred to in said letter, being a part of the exhibit.

THE COURT: There being how many pages altogether?

MR. ANDERSON: There being three typewritten pages altogether; the attached memorandum being signed by W. H. Swenarton, Captain of the Ordnance Department, U. S. A. You have seen that, haven't you, Mr. Kresel?

MR. KRESEL: I do not recall it. There are some pencil memoranda on this letter.

MR. ANDERSON: Will we strike those out?

MR. KRESEL: You do not offer those.

MR. ANDERSON: That part down there (indicating) ought to go out.

MR. KRESEL: I just want to know whether that is included in the offer.

MR. ANDERSON: The pencil memoranda here is included in the offer, but that at the bottom is not.

MR. KRESEL: Will you ask the witness about that.

Q. 164. Mr. Gordon, it appears that on the memoranda attached to the exhibit which I have offered, signed by Mr. Swenarton and addressed to Mr. Ramsay Hoguet, are certain pencil notes apparently referring to the patents of the several numbers listed in that letter of Captain Swenarton. Would you say, if you can, in whose handwriting those notes are and whether they were made by you; and, if not, by whom (handing witness paper)?

A. A part of that is my handwriting and a part of it is not. The pencil memoranda in which it says

"Reported to be owned by Badische Company" and the other part "858094 reported to be owned by Wilhelm Oswald" is my handwriting.

Q. 147. Are the notes opposite the several numbers in your handwriting?

A. No, they are not.

Q. 148. Do you know whose handwriting they are in?

A. May I read this?

Q. 149. Yes.

A. To see if I have any recollection of the transaction. (Examines paper.) That is probably the handwriting of some clerk in my office at the time, in checking that list.

MR. ANDERSON: If your Honor please, in offering this exhibit I will strike the pencil memoranda and ask that those be rubbed off, and the Clerk can rub them off, by agreement of ourselves.

THE COURT: The pencil memoranda on the typewritten memoranda.

MR. ANDERSON: Yes, accompanying the letter.

THE COURT: Are not included in your offer?

MR. ANDERSON: No, they can just be rubbed off.

THE COURT: The exhibit will be admitted and printed without that memorandum.

MR. ANDERSON: Yes, and I ask that the Clerk be authorized to rub that off so as to cause no confusion in printing—the pencil marks. With the statement as to the pencil notes above this exhibit is offered and I understand is admitted.

THE COURT: Yes.

MR. ANDERSON: As Plaintiff's Exhibit No. 70.

Received in evidence and marked "Plaintiff's Exhibit No. 70." (*See Exhibits, Vol. I, page 250.*)

(Mr. Anderson read from Exhibit No. 70.)

MR. ANDERSON: The accompanying memorandum or letter from Captain Swenarton, the United States Army Ordnance Department, to Mr. Ramsay Hoguet, headed "Nitrate Division," in so far as I think it is necessary to read it, is as follows: (Reading further from Plaintiff's Exhibit No. 70.)

I may explain that I introduced this letter at this time because I did not want to put in a part of a paper referring to another matter, but at a later time other letters bearing upon the matter there referred to will be introduced so that the matter may be clear.

(A short recess was taken at this point at the direction of the Court.)

Q. 150. Mr. Gordon, did you as representative of the Alien Property Custodian's office ever have any conference with the Federal Trade Commission about this matter, the sale of these patents; and, if so, about when?

A. Yes. The first one was prior to my first meeting with Mr. Garvan and Mr. Hoguet in New York in an effort to secure——

MR. KRESEL: Wait a minute, he has not been asked yet to state what it was.

Q. 151. The first one was prior to your meeting in New York. Did you have a further conference after that meeting with the Trade Commission?

A. I had several conferences and I think some of them were afterwards. During the period between the first of January and the period of actually starting the investigation.

Q. 152. That was in the month of January?

A. Probably was.

Q. 153. The investigation appearing to have started about the 5th of February. Will you state to the Court the subject of that conference and what was generally the result thereof?

MR. KRESEL: To that we object upon the ground that it cannot be binding upon the defendant; it certainly can not be binding upon the Alien Property Custodian. It does not appear that this witness was authorized to make any representations on behalf of the Custodian, if this talk was in his official capacity, which has not yet been made to appear.

MR. ANDERSON: I asked him in my original question whether he as a representative of the Alien Property Custodian had had any conferences with the Federal Trade Commission on this subject. I think it appears, sufficiently appears, that he was the representative of the Alien Property Custodian in dealing with this entire subject.

MR. KRESEL: I can not quite agree with Colonel Anderson's statement of the appraisal of that situation; but however that may be, any talk that was had between this witness and a third party is not binding upon this defendant, certainly if the third party was not one of the alleged conspirators—and it is not claimed that the Federal Trade Commission was. Nor can it be binding upon the Alien Property Custodian unless it be shown that he was authorized to represent the Alien Property Custodian in this particular matter and was authorized to make representations on behalf of the Alien Property Custodian. And even if it should appear that that was the fact, we should still claim that it is not binding upon the defendant here.

MR. ANDERSON: My position is briefly this. The defendant has vouched here as a part of its answer an exhibit which is a report of the Alien Property Custodian. In that exhibit, a voucher by the defendant of those evidential facts, it ap-

pears that there were discussions between the Alien Property Custodian and the Federal Trade Commission; and it further appears in the correspondence already introduced, taken in connection with that exhibit, that there was some understanding with the President on that subject as to what patents would be seized.

Possibly the statement in the report and in the letter of Mr. Ramsay Hoguet with respect to the understanding with the President as to what patents would be seized and the limitations upon the seizure, are not very clear.

I want to show from the evidence of this witness that as a representative of the Alien Property Custodian's office he went to confer with the Federal Trade Commission on this subject and that he further wrote a letter to Mr. Hoguet in which he urged that the matter should not be discussed further with the Federal Trade Commission.

All of those are facts bearing upon the general development of this scheme. I admit that in an ordinary case of a trial of a definite specific issue not involving conspiracy, it might be a little remote, although a conference between officials of the Government bearing upon the transactions involved, might even then be admissible. But in this case, I do think it is admissible. I do not wish to argue it any further than that. I am just going to offer the evidence.

MR. KRESEL: We consider it, your Honor, of sufficient importance to ask to be heard further on it, if your Honor will hear me. This only illustrates the point that I tried to make in arguing upon the question of whether the seizure was or was not illegal. Whether this witness made any statements to the Federal Trade Commission cer-

tainly can not in any way affect the right of the Alien Property Custodian to make seizure under the Trading with the Enemy Act. Even assuming that there was an understanding between the Alien Property Custodian and the Federal Trade Commission defining the sphere of each office with respect to these patents, the right of the Alien Property Custodian to make seizure can not be affected.

I do not understand that it is desired to have this witness state what the understanding was between the President and the Alien Property Custodian. I do not think your Honor understands that to be the purpose. Now then, if that is not the purpose, to affect the right of the seizure, I say that it is immaterial and irrelevant as to what this witness said to the Federal Trade Commission or what the Federal Trade Commission said to this witness; and it seems to me that we ought not to be sitting here and taking testimony that is so far afield as the question suggests. We claim that it is not binding upon us, what arrangement there was between the Federal Trade Commission and the Alien Property Custodian. For that reason, we object to it as immaterial, irrelevant and incompetent.

THE COURT: I fail to see myself the relevancy or materiality of any answer that this witness may give to this inquiry. But in view of the magnitude of the importance of the proper determination of the issues of this case, I think that our general rule is a proper one in this case, and that the Government, having instituted this case, should possibly not be as strictly bound in the putting in of its evidence—I am speaking not from a strictly legal standpoint now——

MR. KRESEL: I understand.

THE COURT: But in order that there may be an ultimate determination of this case, that the Government may have a record of everything which it may consider as even remotely relevant to the issues of this case. Colonel Anderson assures me that he believes this will be connected up so as to have value. If he does not, it will not aid him in the ultimate determination by me of the issues of this case. If he does, then I would make a mistake in rejecting it at this time.

The general rule will apply, Mr. Kresel, although in this instance I do not see how it is going to be relevant. But if you think you can show that ultimately, you may proceed.

MR. ANDERSON: I think I might personally make an explanation to the Court. Much of this evidence is documentary. Nearly all the persons concerned are now connected with the defendant in some way and therefore the orderly showing of this evidence is very difficult and I recognize that if I put evidence in which is of doubtful admissibility, since there is no jury here involved, neither this Court nor the Appellate Courts will consider evidence which is illegal.

THE COURT: Of course, I need not make this statement that counsel will not offer evidence unless they believe it to have value.

MR. ANDERSON: I certainly would not, sir.

THE COURT: I have no doubt in my own mind about that.

MR. ANDERSON: I may be mistaken, but I would not offer it unless I felt that I could consider it if I had to decide the case.

THE COURT: You understand that I will be just as liberal with the defendant.

MR. ANDERSON: I stated at the outset, the Gov-

ernment wants all the facts in this case that can have any bearing.

MR. KRESEL: You were not so very good to me when you tried to put in with this gentleman that very report. But that is all right. I am not finding fault with you.

(Q. 153 and answer repeated as recorded above.)

Q. 154. I would ask you to state, if you can do so, substantially, the substance of this conference between yourself and the Trade Commission, and who was present representing the Trade Commission or any other organization?

MR. KRESEL: And when, if possible.

MR. ANDERSON: Approximately when, if you can—any information that will identify the time, place, persons present and the substance of these conferences or this conference.

MR. KRESEL: Was there more than one, Mr. Gordon?

THE WITNESS: Yes, there were several.

MR. KRESEL: Can he give the time of any of them?

MR. ANDERSON: Yes.

Q. 155. You stated, I think, that you could not identify the exact dates but some of them were in the month of January?

A. That is true.

Q. 156. And that one you thought was prior to January?

A. That is true.

Q. 157. Now go ahead and state if you can what took place at these several conferences or what took place in your conferences with the Trade Commission, and if possible, who was present representing the Commission, and whether there was any one representing Mr. Hoguet or any one else was present. In

other words, give the Court the facts as far as you can give them?

A. At one conference I met Commissioner Murdock and Commissioner Fort and another gentleman whom I think was a Commissioner, but whose name I have forgotten, having been referred to them for the purposing of securing a copy of the list of German patents compiled by some officer of their Bureau, and they were very insistent that I tell them what the purpose of that list was and why we wanted it, and I said possibly the Custodian will be interested in seizing certain patents, I can not tell you definitely the policy of the Custodian, because I do not know, and so far as I am advised it has not been decided yet; and they were rather inquisitive as to what patents would be seized and for what purpose, and recited to me their understanding with the President of the United States at the time he signed the amendment permitting the seizure of patents—

MR. KRESEL: Just a minute, please.

THE COURT: Do you want to go any further on that?

MR. ANDERSON: I do very much.

MR. KRESEL: May I make a suggestion, your Honor. May I ask Colonel Anderson whether he was seeking to prove some understanding with the President and whether his theory is that that was a matter which would affect the right of the Alien Property Custodian to make seizure? Because from my point of view that would be the only purpose.

THE COURT: You do not need any more information on that point than I do; because I do not understand it at all, Colonel Anderson, and I shall get you to help me on that before allowing this witness to answer. And unless you establish it

I am not going to take that answer, and you can put it in the record under Rule 46 if you want to.

MR. ANDERSON: If your Honor please, I do no wish to go into a full discussion of that subject, but I think the allegation in the Answer, the statement in the report of Mr. Palmer, the statement in the letter of Mr. Hoguet, addressed to Mr. Palmer, which has been introduced here, which states that there was an agreement with the Federal Trade Commisison and an agreement with the President with regard to the seizures and sales, opens the door to showing what was the agreement with the Federal Trade Commission and the President. I feel that that is the case, but I do not want to argue it, because it involves a very elaborate review of the whole evidence in this case and we can not argue one point on a matter of evidence in this case without arguing it all, and if your Honor should rule either way I do not think—

THE COURT: Isn't the answer towards which the witness is tending open to a two-fold objection? Suppose a third person—or we won't suppose it at all, we will just assume the fact as indicated by the witness, that somebody, it does not matter to me who it was, told him that the President had said a certain thing, it seems to me that is sufficient to deny him the privilege or the right to speak further.

MR. ANDERSON: Possibly you mean under the—

THE COURT: The hearsay rule.

MR. ANDERSON: I thought possibly you meant under the law of privilege.

THE COURT: Well, no, I think the hearsay rule stops the mouth of the witness at this point—that is, that alone. In the second place, unless

you are going to attack the seizure I do not see what the understanding of the President about the seizure had to do with it, assuming such understanding existed. So far as the interpretation of the law is concerned, that must speak for itself, and we can not go, if this tends in that direction, and I assume it does—we can not go into the understanding of the President as to what the law was, because that is a judicial function and you can not trespass upon the President's prerogatives.

Mr. Anderson: Can not trespass upon the Government's.

The Court: I mean an executive intrepretation, where it would be regarded with the highest respect the same as the Congressional interpretation, yet it is a thing the Courts do not inquire into. So that, legally, I do not see where this evidence tends and I—

Mr. Anderson: Your Honor will now perceive the reason for offering the statement of Mr. Bradley early in this proceeding and which your Honor refused to take in on the ground that we had not laid the foundation or that it might not be legal evidence.

The Court: May I inquire again there, because there are so many issues coming in here that it is a question which is subordinate and which is the dominating issue to support which you are offering it. Mr. Bradley's statements were offered not to affect the construction or the validity of the act but as one of the steps in the conspiracy, either in its formation or consummation, and we thought at the time it was offered as an overt act and consequently could not be established. I do not see how you can produce hearsay evidence either with respect to the Bradley state-

ment as you were going to offer direct evidence on that. If there was the same effort with respect to the Executive as you contend there was in the Bradley statement to the Congressional Committee still that can not be done by hearsay. Now I am speaking of hearsay evidence.

MR. ANDERSON: I understand, sir.

THE COURT: Because it seems to me I must meet that at the threshold of this objection.

MR. ANDERSON: I think perhaps we will save time, if your Honor please, if you will just let me take that answer under Rule 46, and then if it is not shown in the final argument to be of any validity, I do not think this Court or any other Court would ever consider it.

MR. KRESEL: I do not understand your Honor, that under Rule 46 the Court will take hearsay evidence in any event. Under Rule 46, as I understand, you may take testimony which it is claimed is immaterial or irrelevant, but it has got to be competent and the rules of evidence have got to be observed.

MR. ANDERSON: Rule 46 would not mean anything if it has to be competent.

MR. KRESEL: Yes, it would, because, suppose the Court should rule on my objection that something was immaterial, you could still insist upon its going in.

THE COURT: I think it is not worth while to discuss it, Mr. Kresel, although I am glad to hear you at any time, as I am Colonel Anderson. But Rule 46 does not compel the Court to take an answer. You have stated as I recall it, the purpose of this inquiry. Let us turn to Rule 46. There it says:

"In all trials in equity the testimony of

witnesses shall be taken orally in open Court ***. When evidence is offered and excluded, and the party against whom the ruling is made excepts thereto at the time, the court shall take and report so much thereof, or make such a statement respecting it, as will clearly show the character of the evidence, the form in which it is offered, the objection made, the ruling, and the exception."

Now you may make such objection with respect thereto as you think would be proper, Colonel Anderson.

MR. ANDERSON: Very good, sir. I would just as soon do that. The plaintiff offers to prove by the testimony of this witness that he, acting as the representative of the Alien Property Custodian, dealing with these matters of patents which are the subject of investigation, held a conference with the Federal Trade Commission and the members thereof which he has already stated on the record; that at that conference it was reported to him by the Federal Trade Commission that they had an understanding with the President that no patents, copyrights, etc., would be seized and sold with the exception of those relating to properties seized by the Alien Property Custodian or the stocks of which were seized by the Alien Property Custodian, and which were to be sold as a part of said properties, to be used in connection therewith; and that the President in fact came to the office of the Federal Trade Commission to confer with them and made that statement before he signed the Act of November 4, 1918, amending the law so as to allow the seizure of patents.

THE COURT: I think the offer is in conflict with the rules of evidence which exclude hearsay evidence. I think it would not bind the future acts of the President of the United States under

the Act, subsequent to his approving it. I think that would deal with an administration policy and not a matter of right; that the Executive of the Nation would have a right to modify his policy, assuming that the right existed, and that it would have no bearing upon any issue of this case so far as I understand it. You may have your exception.

MR. ANDERSON: I note an exception. I now offer in evidence a letter dated February 26, 1919, signed Ramsay Hoguet, addressed to Mr. Will T. Gordon, 1916 Washington Loan & Trust Building, Washington, to be identified as Plaintiff's Exhibit No. 71.

THE COURT: It will be admitted.

MR. KRESEL: The same ruling, I assume, your Honor.

THE COURT: Yes.

Received in evidence and marked "Plaintiff's Exhibit No. 71." (*See Exhibits, Vol. I, page 253.*)

MR. ANDERSON: Would you like to see it?

MR. KRESEL: I would like to see it, though I know these very well.

(Mr. Anderson reads Plaintiff's Exhibit No. 71.)

MR. ANDERSON: This is dated the 26th of February, 1916.

MR. KRESEL: 1919.

MR. ANDERSON: 1919. This is the day the Executive Order was signed.

I offer in evidence a letter dated March 4th, 1919, addressed to W. T. Gordon, signed F. E. Barrows, on the letterhead of Pennie, Davis, Marvin & Edmonds, Counsellors-at-Law, New York, to be identified as Plaintiff's Exhibit No. 72.

Received in evidence and marked "Plaintiff's Exhibit No. 72." (*See Exhibits, Vol. I, page 254.*)

MR. ANDERSON: If you will read it, if your

Honor please—I do not care to read it myself if your Honor will read it.

THE COURT: I will let you read that. I was not sure that I caught the date of the preceding exhibit.

MR. ANDERSON: This is March 4th, 1919, addressed to Mr. W. T. Gordon, Alien Property Custodian's Office, sent by F. E. Barrows.

(Mr. Anderson reads Plaintiff's Exhibit No. 72.)

Q. 158. Was the Mr. F. E. Barrows who signed that letter the gentleman whom you identified this morning as the counsel for the National Aniline & Chemical Company?

A. He was.

MR. ANDERSON: I offer in evidence letter dated March 4, 1919, addressed to W. T. Gordon, Esq., from F. E. Barrows, on the letterhead of Pennie, Davis, Marvin & Edmonds, Counsellors-at-Law, New York, which letterhead shows that Mr. Barrows was identified with that firm, and ask that it be identified as Plaintiff's Exhibit 73.

THE COURT: Admitted.

Received in evidence and marked "Plaintiff's Exhibit No. 73." (*See Exhibits, Vol. I, page 255.*)

(Mr. Anderson reads from Plaintiff's Exhibit No. 73.)

MR. ANDERSON: The rest of it is personal.

THE COURT: Who signed it?

MR. ANDERSON: That is signed F. E. Barrows.

Q. 159. This is the same Mr. Barrows to whom you have already referred in your testimony, is it not?

A. It is.

MR. ANDERSON: I offer in evidence a letter dated March 6, 1919, initialed "W. T. G." to F. E. Barrows, Attorney and Counsellor-at-Law, New York. It will be admitted, I presume, that W. T.

G. means W. T. Gordon and that this letter was written by him?

MR. KRESEL: Yes.

MR. ANDERSON: I ask that it be identified as Plaintiff's Exhibit 74.

THE COURT: Admitted.

Received in evidence and marked "Plaintiff's Exhibit No. 74." (*See Exhibits, Vol. I, page 257.*)

(Mr. Anderson reads Plaintiff's Exhibit 74.)

MR. ANDERSON: I offer in evidence letter signed by Ramsay Hoguet on the letterhead of the Alien Property Custodian addressed to Mr. Will T. Gordon, dated New York, March 7, 1919, to be identified and read as Plaintiff's Exhibit No. 75.

THE COURT: Admitted.

Received in evidence and marked "Plaintiff's Exhibit No. 75." (*See Exhibits, Vol. I, page 258.*)

(Mr. Anderson reads Plaintiff's Exhibit No. 75.)

MR. ANDERSON: I offer in evidence a letter dated March 10, 1919, signed by F. E. Barrows, addressed to Will T. Gordon on the lettedhead of the firm with which I have already indicated Mr. Barrows was connected, to be identified and read in evidence as "Plaintiff's Exhibit 76."

THE COURT: Admitted.

Received in evidence and marked "Plaintiff's Exhibit No. 76." (*See Exhibits, Vol. I, page 258.*)

(Mr. Anderson reads Plaintiff's Exhibit No. 76.)

MR. ANDERSON: I offer in evidence a letter dated March 11, 1919, from W. T. Gordon, of the Bureau of Investigation, to Mr. Ramsay Hoguet, initialed "W. T. G." with the same agreement that it means W. T. Gordon, to be identified as "Plaintiff's Exhibit 77."

THE COURT: Admitted.

Received in evidence and marked "Plaintiff's Exhibit No. 77." (*See Exhibits, Vol. I, page 259.*)

(Mr. Anderson reads Plaintiff's Exhibit No. 77.)

MR. ANDERSON: I offer in evidence a letter dated March 13, 1919, to H. E. Danner, Treasurer of the American Dyes Institute, signed W. T. Gordon, to be identified as "Plaintiff's Exhibit No. 78."

THE COURT: Admitted.

Received in evidence and marked "Plaintiff's Exhibit No. 78." (*See Exhibits, Vol. I, page 260.*)

(Mr. Anderson reads Plaintiff's Exhibit No. 78.)

Q. 160. The Danner referred to there is the H. E. Danner who was Secretary of the American Dyes Institute, is it not?

A. That is true.

MR. ANDERSON: I offer in evidence a letter signed by Ramsay Hoguet, dated March 15, 1919, addressed to Will T. Gordon at Washington, to be identified and read as "Plaintiff's Exhibit 79."

THE COURT: Admitted.

Received in evidence and marked "Plaintiff's Exhibit No. 79." (*See Exhibits, Vol. I, page 261.*)

(Mr. Anderson reads Plaintiff's Exhibit No. 79.)

Q. 161. You were, at the time that letter was written, still in the service of the Alien Property Custodian, were you not?

A. I was.

Q. 162. You had then moved your office back to the Alien Property Custodian's Office, had you not? That was on the 15th of March, 1919?

A. I cannot answer that, Colonel, because I do not remember.

Q. 163. Yes. Did you place at the disposal of Dr.

Tucker the facilities of the Alien Property Custodian's Office on this subject in accordance with the request of that letter?

A. All facilities relating to the patent investigation and to patents in which he was interested.

MR. ANDERSON: I offer in evidence a letter dated March 15, 1919, addressed to Mr. Ramsay Hoguet, and initialed "W. T. G." to be read in evidence as "Plaintiff's Exhibit No. 80."

THE COURT: Admitted.

Received in evidence and marked "Plaintiff's Exhibit No. 80." (*See Exhibits, Vol. I, page 263.*)

(Mr. Anderson reads from Plaintiff's Exhibit 80.)

MR. ANDERSON: I offer in evidence a letter dated New York, March 29, 1919, on the letterhead of the Alien Property Custodian, addressed to Mr. Will T. Gordon, and signed "Ramsay Hoguet," to be identified and read as "Plaintiff's Exhibit No. 81."

THE COURT: Admitted.

Received in evidence and marked "Plaintiff's Exhibit No. 81." (*See Exhibits, Vol. I, page 264.*)

MR. ANDERSON: I will read the letter by Mr. Hoguet to Mr. Gordon just identified (reading).

Q. 164. Who was the Mr. Mulvey there referred to?

A. Mr. McGruder's assistant in the assignment division of the Patent Office.

Q. 165. He was the officer in the Patent Office of that name to whom you have already referred, was he?

A. Yes, sir.

Q. 166. He was the gentleman who was employed after office hours, at night and on Sundays, for the reasons you have stated, at the conversation which

you have stated, at $4 a day, to help in this work; is that right?

A. An hour.

Q. 167. Four dollars an hour to help in this work?

A. Yes.

MR. ANDERSON: I offer in evidence letter dated March 28, 1919, addressed to Mr. Ramsay Hoguet, initialed "W. T. G." for Bureau of Investigation.

MR. KRESEL: What is the date?

MR. ANDERSON: It is the letter referred to in this letter. I should have put that in first.

MR. KRESEL: All right, put it in now.

THE COURT: The authenticity is admitted?

MR. KRESEL: The authenticity is admitted, yes.

THE COURT: Admitted.

Received in evidence and marked "Plaintiff's Exhibit No. 82." (*See Exhibits, Vol. I, page 264.*)

MR. ANDERSON: I will not read that letter, so that will close that question.

THE COURT: We will take a recess until one o'clock, Standard Time.

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AFTER RECESS.

MR. ANDERSON: Would your Honor permit me to finish reading certain evidence with Mr. Kresel, and then I hope to make an agreement, by which it will take about ten minutes or so, to get rid of a witness. Or would you prefer me to go on now and finish that afterwards?

THE COURT: No, choose your own course.

MR. KRESEL: It would be only a few minutes, your Honor.

MR. ANDERSON: Would you permit me to speak to the witness a minute?

THE COURT: Yes.

MR. ANDERSON: I won't interrupt the proceedings, I will do it after adjournment. He wants to get away on a train. He wants to leave on a train, and we think we can agree on certain evidence.

Q. 168. Mr. Gordon, do you know whether it was or was not the practice of the Alien Property Custodian's Office to have property appraised before it was sold?

A. That is the practice.

Q. 169. Do you know if any appraisal of the patents here in question was ever made?

A. I do not. If there was any I never heard of it.

Q. 170. You never heard of it?

A. No, sir.

Q. 171. Did you hear of any suggestion that an appraisal be made, of the patents?

A. Yes, Mr. Hoguet told me that they had engaged Dr. Hesse, who was a chemist of one of the Aniline Chemical Companies, to appraise separately the patents seized; but so far as I know that was never carried out.

Q. 172. Did Mr. Hoguet ever discuss with you the value of this property—these patents?

A. He may have in general discussion, but I don't recall particular instances other than his statement that the big electric companies carried their patent assets on their books at a dollar each. Now, I cannot recall the date of that, but I do remember specifically that statement.

Q. 173. Was there any suggestion ever made by him or anyone else in your presence that the price fixed bore any relation to the value of the property?

A. Not that I remember.

Q. 174. Did you ever hear them discuss the method by which the amount paid was arrived at?

A. I did not. I carefully avoided all questions of value of the patents, because primarily—

MR. KRESEL: One minute, please. He has answered the question and I object to a further statement as to what he avoided and the reasons for it.

MR. ANDERSON: I will not insist upon going into that if the witness has answered.

MR. KRESEL: Of course, not.

Q. 175. Do you know approximately the cost of obtaining a patent from the Patent Office? You said you are a patent lawyer.

A. The Government fees at the time these seizures were made were $35, and it has since been raised to $40. My minimum fee—

MR. KRESEL: One minute, please. I object to that.

THE COURT: We are not concerned with that, Colonel Anderson, what this witness's minimum fee is.

MR. ANDERSON: No, I did not ask him for that. I just wanted to know what was the cost generally of obtaining a patent from the Patent Office.

THE COURT: The Government fees or counsel fees?

MR. ANDERSON: The counsel fee is almost an inevitable incident of that cost and if the witness could say generally without going into his particular charge, if he knew what was generally the approximate cost of obtaining a patent, I would like for him to say so.

THE COURT: Without regard to his prime cost?

MR. ANDERSON: Average cost. For instance, the evidence shows that at the conference, Mr. Barrows said that the average cost was $100 each. I want to know if the witness could state on this subject, and if he can, I want to have his general experience. I do not care for his specific fees, because I do not think that would be evidence.

MR. KRESEL: Our objection is that it is immaterial and irrelevant as to what the cost was or might have been.

THE COURT: Many patents are worth many times the cost and many are not worth anything?

MR. KRESEL: Exactly.

MR. ANDERSON: I understand that. Could the witness answer generally if he knows what is the general cost of obtaining patents. Is there any sum generally for all patents?

THE WITNESS: Yes, sir, from $100 to $150.

Q. 176. That covers the fees of the Patent Office and the usual average attorney fees as you understand them?

A. Yes, sir.

Q. 177 And the expense of printing, and so on?

A. That is right.

MR. ANDERSON: That is all.

CROSS-EXAMINATION.

By MR. KRESEL:

XQ. 178. Mr. Gordon, did you have any official designation while you were associated with the Alien Property Custodian's Office?

A. My original appointment read as attorney in the Bureau of Investigation.

XQ. 179. And that was under Mr. Garvan's charge at that time?

A. That is true.

XQ. 180. And you still held that appointment when you testified this morning you were assigned by Mr. Garvan to the work that you described this morning?

A. That is true.

XQ. 181. Mr. Hoguet, whom you described as a dollar-a-year man; did he have any official position with the Alien Property Custodian?

A. I understood that he was patent advisor to the Custodian.

XQ. 182. Well, prior to this time, about the 1st of January, I think you said, 1919, when you were detailed to this work, you knew Mr. Hoguet, did you not?

A. I did not. I had never seen Mr. Hoguet prior to my first visit to his office.

XQ. 183. Well, did you know, prior to your visit to his office that there was a Mr. Hoguet who was Patent Attorney for the Alien Property Custodian?

A. I did.

XQ. 184. And while we are on that, Mr. Gordon, prior to the seizure of these patents that you testified about this morning, the Alien Property Custodian had seized other patents, had he not?

A. Yes.

XQ. 185. Indeed, I think you said this morning that one of the first things you did was to see what seizures had already been made?

A. That is true.

XQ. 186. So that you did not demand and seize the same patents all over again; you remember that?

A. That is true.

XQ. 187. And subsequent to the seizures which are involved here, the Alien Property Custodian seized other patents, did he not?

A. I have no direct knowledge. Yes, I have; the War Department seizures, I am sure.

XQ. 188. Of course. Don't you remember they seized as many as 5,600 other patents?

A. I don't know the number but I know there was a large number.

XQ. 189. A very large number running into the thousands?

A. Yes.

XQ. 190. And that, having seized those patents,

the Alien Property Custodian turned them over to the War and Navy Departments; you knew that?

A. I don't know what disposition was ever made—

MR. ANDERSON: I think, if your Honor please, that would be a matter of record. If they were turned over to the office, I think that would be the proper record.

MR. KRESEL: He says he did not know it, so I cannot press it any further.

MR. ANDERSON: I did not hear his answer.

XQ. 191. I understood you to say that?

A. I do not know what disposition was ever made of it.

XQ. 192. Did you have anything to do with the seizure of those patents?

A. Mr. Garvan suggested—

XQ. 193. Just tell me yes or no, please?

A. Well, a very limited—

XQ. 194. For instance. Did you make title searches of those patents?

A. No.

XQ. 195. You did not?

A. I could answer that question in just a few words.

XQ. 196. Well, go on and answer it?

A. Mr. Garvan assigned me to assist those gentlemen in any way I could.

XQ. 197. Which gentlemen?

A. Those who were in charge of the War and Navy Department seizures, if I may designate them as such. I offered my services and all available information I had acquired in connection with the previous investigation, but they did not seem disposed to accept it, preferring to do the work themselves and my help to them was very limited, if any.

XQ. 198. And those gentlemen were officers of the

War and Navy Departments. I mean, they were connected with the War and Navy Departments?

A. I am quite sure they were, though I have forgotten right now who directed it.

XQ. 199. I think there was a letter put in this morning in which a gentleman named Swenarton was mentioned. Do you know Mr. Swenarton?

A. I do not.

XQ. 200. Do you know whether he was one of the gentlemen that you now mention as having the matter in charge for the War and Navy Departments?

A. I do not. But being an officer in the Army, I do not think he assisted in the conduct of that investigation.

XQ. 201. Your work in connection with the seizure of these patents that you testified about this morning was done by you under the direction of Mr. Hoguet?

A. That is true.

XQ. 202. And whatever you did in this connection, you did as an employee of the Alien Property Custodian's Office?

A. That is true.

XQ. 203. Did you know Mr. Barrows prior to January 1, 1919?

A.No, I met him the first time in Mr. Hoguet's office at that conference. I do not remember the exact date of it.

XQ. 204. We will come to that in a minute. How about Mr. Squair? Is it Squire or Squair?

A. Squire, I think.

XQ. 205. Well, we will call him Squire. The spelling is S-q-u-a-i-r, I understand it. However, did you know him before this conference in Mr. Hoguet's office?

A. I did not.

XQ. 206. Your recollection is that you were as-

signed to this work by Mr. Garvan either the day before New Year's of 1919 or the day after?

A. That is true.

XQ. 207. And is it your recollection that either on the same day that you were assigned to this work by Mr. Garvan, or on the day following, you want to see Mr. Hoguet?

A. Yes.

XQ. 208. When did you do the first work pursuant to this assignment by Mr. Garvan?

A. During January.

XQ. 209. During January?

A. Yes, sir.

XQ. 210. Did you commence immediately after your return to Washington?

A. To the best of my recollection I did.

XQ. 211. That would be the 3rd or 4th of January?

A. Yes.

XQ. 212. Well, what did you do pursuant to that assignment before you received any patents or copies thereof from Mr. Squair?

A. To the best of my recollection, the first thing was to determine what patents had been previously seized by the Custodian.

XQ. 213. By the Alien Property Custodian?

A. Yes.

XQ. 214. That you did first?

A. Which was quite a task.

XQ. 215. Is that all you did before you received these copies of patents from Mr. Barrows and Mr. Squair?

A. No, I had the demands and reports printed, and organized the force of abstractors, and engaged office space, and got such equipment as I then thought necessary together.

XQ. 216. You are quite certain that you started on this early in January?

A. Just what do you mean by "this"?

XQ. 217. This work.

A. Yes, I am quite certain as to the day I was assigned as Mr. Hoguet's assistant if that is what you mean.

XQ. 218. Yes, that is what I do mean?

A. Yes.

XQ. 219. Did you write this letter which I show you, to Mr. Hoguet (Handing witness)? That has not yet been put in evidence?

A. Yes, that is a photostat of my letter and my signature.

XQ. 220. Before I put it in evidence, Mr. Gordon, you notice the date of it is February 3d, 1919?

A. Yes.

XQ. 221. After reading that letter is your recollection refreshed as to when you started working on these patents pursuant to Mr. Garvan's designation?

A. You mean as to the exact date the abstracting started?

XQ. 222. Yes, I mean as to the actual work of the seizing of the patents.

A. No, I do not.

XQ. 223. And making demands?

A. I know it was the first part of the year, probably the latter part of January or the first of February, but I cannot remember the exact date.

XQ. 224. Let me call this to your attention: The meeting to which Colonel Anderson called your attention, of which there was a stenographic report, which you say you read—

A. Yes.

XQ. 225. That was held on the 27th of January, 1919?

A. Yes.

XQ. 226. Do you recall whether you did any of this abstracting work before that meeting?

A. Yes, I recall that none was done before that meeting.

XQ. 227. None was done. So, at least we have it then that it was not until after the 27th of January, 1919, that you did any of the abstracting work?

A. That is true.

XQ. 228. So that the period preceding that and between the first of January, when you say you saw Mr. Garvan, as I understand it you spent in looking over your records to see what patents had already been seized engaging your quarters, engaging help, and having the forms printed; is that about right?

A. Yes, that is true.

MR. KRESEL: I now offer in evidence this letter of February 3rd; is it all right?

MR. ANDERSON: All right.

MR. KRESEL: There is an enclosure with it, copy of a letter to Mr. Poucher, which I would like to go in.

THE WITNESS: May I see the enclosure, to see if I can identify that with certainty? I did not look at anything but the original letter.

MR. ANDERSON: If it is duplicated in the record, it will not be printed.

MR. KRESEL: No. The gentleman called my attention to the fact that the enclosure with this letter has probably gone in as part of the minutes of the American Dyes Institute. I have an indistinct recollection that that is the fact. If so, it will not be duplicated.

THE COURT: If that be true, then at this point in the record it may appear that it is admitted, but if it appears at any other part of the record, there will be no duplication.

MR. ANDERSON: Yes, sir.

MR. ANDERSON: Other than that, there is no objection to the offer at this time. Subject to the general objection that both sides are taking? I have no objection to this going in but the only thing, it is with the understanding that if it is in the record it will be properly identified and not duplicated.

THE COURT: Then it will be admitted out of order and otherwise without objection.

MR. ANDERSON: Yes, sir.

Received in evidence and marked "Defendant's Exhibit No. 3." (*See Exhibits, Vol. IV, page 2035.*)

THE WITNESS: Do you want me to identify that enclosure?

XQ. 230. Yes, if you will.

A. It does not bear my signature, but I remember dictating the letter.

MR. KRESEL: This letter is from the witness Gordon to Mr. Ramsay Hoguet. The enclosure is from Mr. Gordon to Mr. Poucher. The letter is dated February 3rd—they are both dated February 3rd.

THE COURT: Let the enclosure take the exhibit number followed by the letter "a."

Received in evidence and marked "Defendant's Exhibit 3-A." (*See Exhibits, Vol. IV, page 2036.*)

XQ. 231. Now, Mr. Gordon, as I understand your testimony as to the work done by Mr. Squair and by Mr. Barrows, it was the preliminary work of selecting patents which were subsequently submitted to you and which you used in making your title searches?

A. That is true.

XQ. 232. And I think you will recall, Mr. Gordon, that at the meeting of the 27th of January, at which you were present, there was a suggestion made that

the patent counsel of the Chemical concerns that were there representd would assist the Alien Property Custodian because of their familiarity with the subject to the extent of making such selections?

A. I think that is true.

XQ. 233 Now, insofar as the searches are concerned, those were made by you and those working under you?

A. That is true.

XQ. 234. And after you had made your searches, you made reports to the Alien Property Custodian?

A. That is true.

XQ. 235. It was upon those reports so made by you that the Alien Property Custodian determined the enemy status of a person or corporation whose patent was being seized?

A. Yes.

XQ. 236. And it was you, or under your direction that the demand, the form of demand, was made and filed with the Patent Office which created the seizure?

A. Yes; if I may clear you on that point, the reports—

XQ. 237. I wish you would?

A. The reports and demands were made simultaneously; and for the sake of order, attached together and sent to the Custodian's office in that way.

XQ. 238. You stated that Mr. Hoguet initialed the demands.

A. That is true.

XQ. 239. And that after you had drawn them and he had initialed them they went to the Alien Property Custodian for his signature?

A. That istrue.

XQ. 240. And when you speak of the Alien Property Custodian in this connection you mean A. Mitchell Palmer?

A. Either Mr. Palmer or Mr. Garvan. Mr. Garvan came in before the work was completed, I believe.

XQ. 241. Prior to the 4th of March, of course, you mean Mr. Palmer?

A. Prior to Mr. Palmer's resignation. I do not remember the date.

XQ. 242. In other words, demands prior to March 4th were signed by Mr. Palmer.

A. Yes.

XQ. 243. Subsequent to March 4th by Mr. Garvan?

A. Yes.

XQ. 244. As to what patents should be seized, that was a question that you, Mr. Hoguet and Mr. Palmer decided; isn't that so? I did not mean to put you at the head of the list, but in the evolution you come first.

MR. ANDERSON: I think, if your Honor please, the question calls for the conclusion of the witness. As to who decides the question is a question of law. The facts in relation to and leading up to his decision is a matter as to which the witness can testify.

MR. KRESEL: I do not think that, properly speaking, I am calling for a conclusion; but even if I were, I am cross-examining this witness.

THE COURT: I think you may have the answer, and if there is any doubt about it you may clear it up on re-direct examination.

XQ. 245. Would you like me to re-frame that question?

A. I would like to hear the question again.

XQ. 246. I will withdraw that question. The determination of what patents were to be seized, which determination was subsequently carried out, was made by Mr. Palmer as Alien Property Custodian after you

had made the investigation and after it had been O. K'd by Mr. Hoguet; isn't that right?

A. In theory that may be true—

XQ. 247. I am not asking you about the theory.

A. (Continuing) But in practice it was not, because in signing that many demands, Mr. Palmer could not have possibly told by the name and title of the invention whether it was a proper patent to seize or not. He simply signed them one at a time, with somebody else blotting his signature, as fast as he could.

XQ. 248. And he acted in that respect upon your report and upon your investigation, did he not?

A. Yes.

XQ. 249. Coupled with Mr. Hoguet's?

A. Coupled with Mr. Hoguet's initials.

XQ. 250. His O. K.?

A. "R. H." on each demand.

XQ. 251. That is quite right. You did not seize and when I say you I mean the Alien Property Custodian did not seize, all of the patents copies of which were sent to you by Mr. Barrows and Mr. Squair, did you?

A. No.

XQ. 252. And after Mr. Barrows and Mr. Squair had sent their copies the Alien Property Custodian represented by yourself and Mr. Hoguet subsequently seized patents which were not on Mr. Squair's and Mr. Barrow's lists at all; isn't that right?

A. That is true.

XQ. 253. Now I would like to return with you to the first conversation which you say you had with Mr. Garvan about the 1st of January, 1919. Would you mind stating whether anybody else was present at that interview but Mr. Garvan and yourself?

A. There may have been, but I do not remember anybody else.

XQ. 254. Was it at Mr. Garvan's office in New York?

A. That is true.

XQ. 255. That is the Alien Property Custodian's Office?

A. That is true.

XQ. 256. Will you state, as near as you can now recall, the substance of the conversation which you there had with Mr. Garvan?

A. Briefly, "I want to seize all German patents and I consider Ramsay Hoguet as our expert on patents and I want you to go down and talk to Hoguet and decide what can be done and how it can be done and report to me and we will follow Mr. Hoguet's and your recommendation." That is substantially the conversation.

XQ. 257. And when Mr. Garvan spoke to Mr. Hoguet, while you did not know Mr. Hoguet personally, you knew who he meant?

A. Yes.

XQ. 258. Namely, the gentleman who had been acting as Patent Counsel for the Alien Property Custodian before that?

A. Yes.

XQ. 269. It is your recollection, then, that either on the same day or on the following day you went to see Mr. Hoguet?

A. Yes.

XQ. 260. At his office?

A. Yes.

XQ. 261. In New York?

A. Yes.

XQ. 262. Did you notify Mr. Hoguet that you were coming; did you make an appointment with him?

A. I think someone from the 42nd Street Office called him up and told him I was coming down.

XQ. 263. At this interview in Mr. Hoguet's of-

fice who was present besides Mr. Hoguet and yourself?

A. No one in the first part of the interview, and subsequently during the day he called in Mr. Barrows and Mr. Prindle.

XQ. 264. Prindle?

A. Prindle.

XQ. 265. Yes.

A. And possibly one or two others that I don't remember.

XQ. 266. Then you had an interview with Mr. Hoguet when just you and he were together?

A. That is true.

XQ. 267. Now, please tell us as near as you recall it what conversation you had with Mr. Hoguet on that occasion?

A. Largely with respect to the manner in which the assignment records of the Patent Office were kept and the information necessary in order to make an abstract of title and report on the patents investigated.

XQ. 268. I assume that when you met M. Hoguet you told him of Mr. Garvin's instructions?

A. That is true.

XQ. 269. Given to you?

A. That is true.

XQ. 270. You told him, I assume, that Mr. Garvan had assigned you to this work, to be done by you under Mr. Hoguet's instructions?

A. I beg your pardon, but I think it was the following day when Mr. Garvan designated me as Hoguet's assistant, when Hoguet and I reported to him together.

XQ. 271. Then shall we take it that at your first interview with Mr. Garvan he did not designate you to this work, but told you that he wanted the work done and asked you to see Mr. Hoguet and make the arrangement; is that it?

A. Well, substantially, yes. He had not directed me to do a specific thing, but to discuss with Mr. Hoguet that thing.

XQ. 271-a. In other words, he had not formally designated you to the work?

A. No, his instructions were very general.

XQ. 272. But he did formally designate you to be Mr. Hoguet's assistant and to have charge of the work under Mr. Hoguet's supervision the day after your interview with Mr. Hoguet?

A. That is my recollection.

XQ. 273. Then to return to Mr. Hoguet's office, you told him of your interview with Mr. Garvan and you and he discussed the *modus operandi* for doing the work; is that it?

A. That is the best of my recollection.

XQ. 274. And that is substantially, as far as you recall, the subject of the conversation that you then had with Mr. Houget?

A. Do you mean when only the two of us were present?

XQ. 275. That is all I am speaking of at the present time?

A. Yes.

XQ. 276. And you recall nothing further than that as to that interview?

A. No.

XQ. 277. Did you wait in Mr. Hoguet's office until these other gentlemen joined the conference or was there a second conference on the same day about it?

A. I think we went to lunch together and met them when we came back. He telephoned them in my presence and some time during the afternoon, probably just after lunch, they met there.

XQ. 278. At Mr. Hoguet's office?

A. Yes.

XQ. 279. And your recollection now is that there were present beside Mr. Hoguet and yourself, Mr. Squair and Mr. Barrows and two others?

A. I beg your pardon. I did not say Mr. Squair.

XQ. 280. I misunderstood you.

A. I do not think he was present.

XQ. 281. Mr. Barrows was present?

A. Yes.

XQ. 282. Two others?

A. Mr. Prindle and I think one or two others whom I don't remember. Mr. Prindle and Mr. Barrows are the only two that I definitely remember.

XQ. 283. As to the other two, do you recall whom they represented?

A. No, I do not.

XQ. 284. Now then, there are four of you at least at this conference, aren't there?

A. That is true.

XQ. 285. Please tell us the substance of the conversation that was had at that time?

A. The general discussion as to whether it was advisable to license patents under Section 10 of the Act, or whether it would be better to seize those patents, and through some corporation in which title might be vested, to license from such coroporation; and then quite a discussion followed on the meaning of Section 10 and the responsibility or liability assumed by a licensee under a Federal Trade license.

XQ. 286. All this discussion as to whether it was better to seize or to license, and what the proper construction of Section 10 of the Act was, was entirely contrary to what Mr. Garvan had told you he wanted done, was it not? He told you he wanted these German patents seized, isn't that right?

A. Yes.

XQ. 287. Can you recall and can you state here either in so many words or in substance what Mr.

Hoguet said at this interview and what you said at this interview, what part Mr. Barrows took at the interview and what part Mr. Prindle had; or was it such a general discussion that you can not now recall?

A. It was a general discussion; and all of those gentlemen being my seniors in the practice, I left the discussion largely to them.

The only thing I definitely remember stating was that if I represented a client, I would advise direct infringement rather than a license, because a licensee under the law as it stood was in no better or worse position than an infringer, as he was liable to suit at any rate.

XQ. 288. You mean a licensee under Section 10 of the Act?

A. Yes, Mr. Hoguet took the leading part in the discussion, I might say.

XQ. 289. Other than you have told us now, and you have tried as I understand to give us your best recollection of the substance of the conversation at that interview—you have given it to us now as far as your recollection serves you?

A. That is true. There was no written memorandum or minutes made that I know of and it is purely a matter of memory.

XQ. 290. The reason I am questioning you so closely about this particular interview, Mr. Gordon, is that this morning upon your direct examination you said, as I made the note, that there was a discussion there as to what patents should be seized in the interest of the interested companies. I think I am quoting your exact language. Did anybody say anything about seizing patents in the interest of any interested companies, or was that your conclusion?

A. Well, if I may explain that question—

XQ. 291. I would rather, Mr. Gordon, if you can, that you would answer my question directly. Did

anybody at that interview speak of seizing patents in the interest of the interested companies?

A. Yes; Mr. Barrows, for one.

XQ. 292. What did Mr. Barrows say?

A. He told of his experiences in connection with procuring licenses through the Federal Trade Commission; and so far as I remember, none of these gentlemen represented anything other than a chemical industry.

XQ. 293. You mean the gentlemen who were present?

A. That is true. And necessarily, they were the things— I mean, they were the class of patents that they were most interested in, chemical patents.

XQ. 294. Is that all you want to say in answer to my question?

A. No, I would like to preface that remark by saying, with respect to Mr. Garvan's general statement of all German owned patents, we discussed, the character of patents in which Germany led and dominated in this country, at that interview.

XQ. 295. That is, you and Mr. Garvan discussed that?

A. No, Mr. Hoguet and Mr. Barrows; and I remember it was mentioned that the American people probably led in agricultural implements and inventions and probably certain other lines in which Germany had made very nominal progress so far as inventive ingenuity was concerned, but their efforts had been confined largely to chemical dyes and such schedules in which they practically dominated the industry.

XQ. 296. You see, Mr. Gordon, I have not interrupted you purposely. I wanted you to finish your answer; and if you have finished, I want to direct your attention to the fact that that does not answer the question.

THE COURT: Had you finished?

THE WITNESS: I had.

XQ. 297. What I am trying to have you recall, if you can, and tell us, is what anybody at that conference said with respect to seizing patents in the interest of any interested companies?

A. I think instead of an interested company, the industry as a whole was discussed.

XQ. 297a. Now, that is different. There is, as I understand it, the substance of this interview in addition to a discussion as to licenses under Section 10 as distinguished from a seizure—that those present discussed the advisability of doing one or the other in its relation or its bearing upon the chemical industry of the United States; is that it?

A. Yes.

XQ. 297b. All right. Now, of course, your instructions from Mr. Garvan prior to this conference in Mr. Hoguet's office were to see Mr. Hoguet and work with him in seizing all German patents, is that it?

A. Yes.

XQ. 297c. Do I understand that Mr. Garvan did not qualify that, did not say all German chemical patents, but all German patents?

A. To the best of my recollection he did not.

XQ. 297d. "All German patents" is your recollection?

A. Yes.

XQ. 297e. Now then, with that instruction in mind, you did not state to those present that that was Mr. Garvan's instructions?

A. No, I made no reference to anybody but Mr. Hoguet, as to Mr. Garvan's instructions.

XQ. 297f. Now, may I pass from that with the understanding that you have now given me your best recollection of everything that was said at that interview by all those that were present?

A. Did I in my former statement mention the

experience of one or two of the gentlemen in licensing patents under the Federal Trade Commission? There was a general discussion as to their experiences in procuring licenses, I remember.

XQ. 297g. Can you tell us what was said upon that subject?

A. No, I cannot.

XQ. 297h. Well, as far as you can now recall, was the experience recited there with the Federal Trade Commission, experience that indicated satisfaction with that arrangement or dissatisfaction?

A. It is my impression that it was an expression of dissatisfaction.

XQ. 297i. All right. Now, after that interview and on the next day, I think you said you and Mr. Hoguet had an interview with Mr. Garvan?

A. That is true.

XQ. 297j. At the A. P. C. office in New York?

A. That is true.

XQ. 297k. Well, did you or did Mr. Hoguet, or did both of you report to Mr. Garvan what had taken place at this conference the day before?

A. Mr. Hoguet did most of the talking, if my recollection serves me right.

XQ. 297l. And was it upon this occasion that Mr. Garvan definitely assigned you to this work?

A. It was.

XQ. 297m. And he did that in the presence of Mr. Hoguet?

A. That is true.

XQ. 297n. And his instructions were that you were to do the work under Mr. Hoguet's guidance and supervision?

A. His instructions were that he designated me as Mr. Hoguet's assistant.

XQ. 297o. Yes.

A. Whatever that meant.

XQ. 297p. All right. Now, other than this arrangement so made that you have now described, involving your assignment as Mr. Hoguet's assistant, what else was said at this interview with Mr. Garvan?

A. I cannot recall. He said in jest just what my duties would be, that I would spend my time between New York and Washington and that I would have a tremendous big job in front of me and several comments to that effect. That it was an opportunity to do a wonderful piece of work or words to that effect.

XQ. 297q. But that was Mr. Garvan's comment?

A. Yes.

XQ. 297r. Well, you were quite willing to do the work?

A. I accepted it.

XQ. 297s. You considered this was work within the line of your duty?

A. I did.

XQ. 297t. Both your official and your professional duty?

A. I did.

XQ. 297u. And then you went to Washington and made your arrangements as you have described to start on the work of abstracting just as soon as the copies of the patents which you had to have for your work could be supplied to you?

A. Yes.

XQ. 297v. In addition thereto, of course, you made a search to see what patents had alreay been seized?

A. That was probably the first thing I did.

XQ. 297w. The first thing. Very well. Now, Colonel Anderson asked you this morning whether Mr. Barrows and Mr. Squair furnished you lists of patents. Now, my understanding of it is, and if I am wrong, please correct me—that what they furnished you were copies of a large number of patents?

A. That is true.

XQ. 297x. There were no lists, such as I could understand it.

A statement giving a number and a description of a patent, were there?

A. Not that I know of other than the list the Federal Trade Commission compiled.

XQ. 297y. That was a list that was available to you with or without Mr. Barrows or Mr. Squair?

A. That is true.

XQ. 297z. Now, other than to furnish you with the copies of those patents, what other aid and assistance did you, representing the Alien Property Custodian in this way, receive from Mr. Barrows or Mr. Squair or the persons that worked with him?

A. I believe Mr. Barrows brought down two stenographers from New York at one time and they worked for a short period of time and went back; and the investigation with respect to patents owned by some of the larger German corporations was made under Mr. Barrows' direction by having what is known as an assignee search made of the records at the Patent Office; and so far as I know, that was the principal assistance rendered by Mr. Barrows and Mr. Squair.

XQ. 297aa. Now then, as I have it, they furnished you with copies of the patents; they supplied the services of two stenographers, and they made assignment searches with reference to certain of these patents?

A. I beg your pardon, assignee searches.

XQ. 297bb. Assignee searches. Thank you. Just a little different in the Patent Office. That is a little different in the Patent Office from an assignment search.

XQ. 297cc. Well, you see I am not a Patent attorney. Assignee searches?

A. That is true.

XQ. 297dd. Did they assist in making these assignee searches that you had made, your searches as to title?

A. The work was going on at the same time.

XQ. 297ee. Simultaneously?

A. Yes.

XQ. 298. Now, in so far as employing of abstractors, hiring space, employing stenographers, employing people in the Patent Office to do work after office hours, and in all your activities in connection with the search of these patents, making of the demands, filing of those—you did all that, and in all those respects you acted for the Alien Property Custodian?

A. That is true.

XQ. 299. Now, you spoke this morning of another conference, at the New York office of the Alien Property Custodian, at which you said there were present Mr. Hoguet, Mr. Garvan, Mr. Choate, Mr. Pennie and 15 or 20 others. Do you recall that statement?

A. Yes.

XQ. 300. Can you fix the date of that?

A. I cannot.

XQ. 301. Was it subsequent to this meeting of the 27th of January, 1919?

A. I think it was.

XQ. 302. Was it after Messrs. Barrows and Squair had furnished you with these copies of the patents?

A. Yes, because a great number of patents had been seized at that time.

XQ. 303. Had already been seized?

A. Yes.

XQ. 304. And while we are on that, do you recall the date when you first made any seizure of the patents that are here involved?

A. I cannot, but that is a matter of record.

XQ. 305. Was it in the month of February, or was it later?

MR. ANDERSON: I think it is a matter of record.

MR. KRESEL: Of course it is a matter of record, but I am trying to see if he can give me the date so that I can use it and go ahead with it.

A. I think it was in February.

XQ. 306. You think it was February?

A. Yes.

XQ. 307. And you continued to make seizures of patents way into the month of March?

A. Way into summer time.

XQ. 308. And into the summer of 1919?

A. Yes.

XQ. 308a. All right. Now to return to this conference at which that large body of men were present, will you state the substance of what was discussed there at that interview?

A. I think that was a meeting called to read the charter and other organization papers of the Chemical Foundation.

XQ. 309. Well, now let us stop there a minute, if you will. It is already in evidence that the organization was formed, that is, the charter was filed on the 19th of February, 1919. Is it your recollection that this conference that you are now talking about was before the filing of the charter or after?

A. I do not know.

XQ. 310. You do not know?

A. A copy of the charter, of course, and possibly the by-laws were discussed; and in other words the organization of the Company was discussed at that time.

XQ. 311. Very well. And in discussing the charter were amendments of the provisions therein

discussed and considered at that meeting, or changes in it?

A. I do not remember, but I think they were. I think they were. I was not interested in the provisions.

XQ. 312. You were not particularly—

A. It was not part of my business.

XQ. 313. I see. Now, besides reading the charter and by-laws and discussing them, possibly making amendments or additions thereto, what else was done at that meeting?

A. I do not remember.

XQ. 314. The gentleman named Pennie, whose name you mentioned, as being one of those present—

A. Yes.

XQ. 315. Was that the same Mr. Pennie who was mentioned in the letter put in by the Government this morning as the man who went abroad to Paris to advise the President with reference to patent matters?

A. Yes; but I think, if you remember my testimony this morning, I referred to him as a gentleman who I thought to be Mr. Pennie—certainly a member of that firm.

XQ. 316. I understand. Now, this morning, as I recall your testimony as to this particular conference, you said that at that conference Mr. Garvan directed you to seize everything practically. Now, am I wrong about that?

A. I think you are.

XQ. 317. You do not recall that any such thing happened at that time?

A. I do not.

XQ. 318. And as you sit there now, you have given us your best recollection of everything that was done or said at that meeting?

A. No, there are one or two little immaterial incidents that I can relate, if you want me to.

XQ. 319. Of course, if they are immaterial, I am not interested in it. But the meeting was held there, and what was of importance was the reading of these organization papers and discussion of them?

A. To the best of my recollection.

XQ. 320. When was it that Mr. Hoguet suggested as the name of this new corporation American Patents Corporation?

A. Some time prior to that.

XQ. 321. To what?

A. To the date of that meeting. I believe my testimony this morning stated that possibly at the first meeting in his office the first time I ever met him or—

XQ. 322. That would be about the 2nd or 3rd of January?

A. Yes—or shortly after then.

XQ. 323. At all events, it was before January 27th, 1919.

A. You mean the date of the meeting in Washington?

XQ. 324. Yes.

A. I think it was.

XQ. 325. Considerable stress was laid this morning upon the fact that you arranged with employees of the Patent Office after hours and to permit you to do work there nights and Sundays and holidays. Did you make that arrangement?

A. I did.

XQ. 326. You made that arrangement, I assume, under Mr. Hoguet's direction?

A. I did. He knew of it, rather.

XQ. 327. Pardon me?

A. He did not direct me specifically what to do, but he knew of it—with his approval.

XQ. 328. You used your own judgment and discretion—

A. Certainly.

XQ. 329. In a matter of that sort?

A. Certainly.

XQ. 330. And whatever compensation was paid by you was paid by you for these services?

A. That is true.

XQ. 331. During those war times a great deal of work was done at the Alien Property Custodian's office after hours and at night?

A. Probably so.

XQ. 332. In fact Mr. Garvan's department, the Investigation Department, it was very often that you gentlemen had to work nights?

A. That is true.

XQ. 333. And after office hours?

A. That is true.

XQ. 334. And for such work as was done after office hours and at night, it was frequently the case that extra compensation was paid?

A. Not that I ever heard of.

XQ. 335. Well, you did not get any.

A. Certainly not to me.

XQ. 336. You did not get any. You never heard of that?

A. No.

MR. KRESEL: May I have those letters that were put in this morning? There is one particular one that I would like to get. Let me see that letter of February 3rd again, that I put in. It may be that one. Let me see the last one that I put in—just let me look at that.

XQ. 337. In this Defendant's Exhibit No. 3 which is a letter from you to Mr. Hoguet, dated February 3, 1919, that I showed you, with the enclosure of the copy of your letter to Mr. Poucher—you remember those?

A. Yes.

XQ. 338. I notice that you say in this letter to Mr. Poucher as follows:

"Mr. Hoguet was very positive Saturday in instructing me as to the direction of this work which is being done primarily for the Alien Property Custodian, and after Mr. Barrows and Mr. Squair have determined the classes of patents to be searched at the expense of the Institute, the only further service I could suggest for them for the time being is the work of abstracting, should they see fit to engage in such work."

In point of fact they never did engage in the work of abstracting?

A. Yes, their time was too valuable.

XQ. 339. I say, they did not engage in it?

A. No, to the best of my knowledge they did not.

XQ. 340. That was the part of the work that you had charge of?

A. That is true.

XQ. 341. And that was done under your direction?

A. Yes.

XQ. 342. So that what they did was to determine the classes of patents to be searched as you say in this letter, and after they had finished that work, there was no further service that you could suggest for them except the searching of the patents?

A. That is true.

RE-DIRECT EXAMINATION.

By MR. ANDERSON:

RDQ. 343. Mr. Gordon, during the period of stress of the heavy work which you mentioned this morning, covering the seizure of some 3500 patents, you did devote your entire time to the search of patents which were furnished to you or selected by Messrs. Barrows and Squair?

A. I did, or to directing that search. There were a number of them engaged in it.

RDQ. 344. You spoke, in reply to one question, of rches made by you. What did you mean by arches" in that connection?

A. After the main rush of the work was over, I sonally abstracted title to various patents, a ll list of them—I might say anywhere from three four to probably fifteen or twenty—at different es up until the middle of the summer.

RDQ. 345. But during the period from February we will say, to the end of February, when this ch of patents was being seized, the original selec- or search was made by Messrs. Barrows and air, and then you searched the title on the patents ished by them or had it searched, it that true?

A. I had it searched.

RDQ. 346. You spoke of other patents which had seized prior to the time that you undertook this ial work. Do you know from your investigation of matter whether those were patents relating to orations seized by the Alien Property Custodian he conduct of his business?

A. They were.

RDQ. 347. Can you say whether up to the time this particular work of seizing this large group of nts, which you undertook in connection with srs. Barrows and Squair you found any patents had been seized that were not connected with g concerns or business or were needed by the War Navy Departments?

A. No, sir. So far as I know, there were none.

RDQ. 348. Did you ever know of the failure of Alien Property Custodian to sign any demand that presented in connection with the work under in- igation, prepared by you and initialed by Mr. uet?

A. I did not.

RDQ. 349. They were all signed?

A. So far as I know.

MR. KRESEL: There are some letters in this series of correspondence, Colonel, that you have not put in. You may not have had them before you, and I am going to offer some of them.

MR. ANDERSON: I have no objection to their being offered at this time, so far as we are concerned, sir.

THE COURT: Are you through with the witness on both sides?

MR. ANDERSON: Yes, he can stand aside.

THE COURT: Was it brought out in the first few questions of Mr. Gordon's examination as to whether he was a regular employee of the Alien Property Custodian's Department, or was he a dollar-a-year man also?

MR. KRESEL: We did not ask him that.

MR. ANDERSON: I would like to ask that question.

RDQ. 350. You were a regular employee on a regular compensation, were you not?

A. I was. I was not fortunate enough to be a dollar-a-year man.

RDQ. 351. When did you terminate your employment with the Alien Property Custodian?

A. Immediately after Mr. Garvan resigned. I think I was the first man under the former administration to resign when Mr. Miller was appointed.

RDQ. 352. The record shows that it was March, 1921. Then your services with the Alien Property Custodian terminated at that time?

A. That is true.

RDQ. 353. You have not been connected with the Government in any way since that time, have you?

A. No.

RDQ. 354. You are here under subpoena, are you not?

A. That is true.

MR. ANDERSON: Any further question you desire asked, your Honor?

THE COURT: No; I do not know that it makes any difference.

MR. ANDERSON: Is there any reason now, Mr. Kresel, why this witness should not be discharged from the subpoena?

MR. KRESEL: Not in the slightest.

MR. ANDERSON: If so, if we need you in the future you will respond to the request, Mr. Gordon?

THE WITNESS: Certainly.

MR. ANDERSON: I will ask that he be discharged.

THE COURT: You are discharged from further attendance under the subpoena.

THE WITNESS: Your Honor, may I thank you and both counsel for plaintiff and defendant for promptly disposing of me as a witness.

MR. KRESEL: I think, your Honor, upon second consideration, I will not inject this correspondence which is really part of my case. I think I better withhold it.

THE COURT: Unless it is necessary, I should be glad to have you wait until you open.

MR. ANDERSON: The remaining time we will take up putting in exhibits. We have caught up with our exhibits this afternoon and with your Honor's permission we will call no more witnesses until tomorrow morning.

THE COURT: Proceed in your own way, Colonel Anderson.

MR. ANDERSON: I wanted to explain that so your Honor will see the reason for not calling them.

MR. GALLOWAY: If your Honor please, the

plaintiff next offers in evidence a copy of the subscription blank of the defendant, The Chemical Foundation, Inc., which we ask to be considered as read in evidence, as Plaintiff's Exhibit No. 83.

THE COURT: Admitted.

Received in evidence and marked "Plaintiff's Exhibit No. 83." (*See Exhibits, Vol. I, page 266.*)

MR. GALLOWAY: There is nothing I care to read in that, except to call attention to the fact that it provides that the stock should be issued to the voting trustees.

The plaintiff next offers in evidence a letter from Thomas Ewing. Mr. Kresel, can it be agreed that Thomas Ewing was Chairman of the Munitions Board of the War Department?

MR. KRESEL: I think that is the fact. Patent Board.

MR. GALLOWAY: Munitions Patent Board.

MR. KRESEL: Munitions Patent Board—which was, as we understand it, a joint board of the Army and Navy dealing with patents during the war.

THE COURT: Admitted.

MR. GALLOWAY: It is dated November 10, 1918, a letter from Thomas Ewing, Chairman of that Board, to Ramsay Hoguet.

MR. KRESEL: Mr. Galloway, may I inquire what that deals with and what is the purpose of it?

MR. GALLOWAY: Yes, just a minute.

MR. KRESEL: If you will tell me.

MR. GALLOWAY: This is a letter in which it says: "It has been suggested by the Patent Section of the Federal Trade Commission that it might be desirable for the War Department to take out licenses under enemy-owned patents where the question of infringement is likely to be

raised after the war, particularly in cases where the rights have been infringed by contractors for the Government and the Government has agreed to hold the contractors harmless." I might say, Mr. Kresel, we are bringing this in now to lead up to the Haber nitrogen patents, and this is a preliminary step to that.

MR. KRESEL: I know this correspondence, and you know it, but the Court does not. Don't you think it would be well for the sake of clarity that the Court may understand the purpose of all this, to make a statement to the Court of what was proposed and what the final decision of the War Department was?

MR. GALLOWAY: We think that the record as we progress will do that.

MR. KRESEL: You do not think you would care to make any such statement?

MR. GALLOWAY: The record as we shall read it here or offer to read it will show it step by step, we think, in that regard.

MR. KRESEL: You see, Mr. Galloway, from our point of view unless it is for the purpose of connecting up with what the Foundation did subsequently pursuant to the request of the War Department and the Navy Department, it is absolutely immaterial; and I thought, as the Court has so often said there is no jury here to prejudice anybody, we might agree upon a statement we could make to the Court of what it was that the War and the Navy Departments proposed, what the Foundation did, and then you can go ahead and put in the correspondence.

MR. GALLOWAY: There are several intermediate steps before we get to the transaction between the War Department and the Navy Department and the Chemical Foundation.

MR. KRESEL: Is it your purpose to put in the entire line of correspondence?

MR. GALLOWAY: I cannot say that we shall put in the entire file, because many things we consider as perhaps immaterial to the contentions that we make here; but we do propose to put in all that we do think is material to those contentions.

MR. KRESEL: If your Honor will permit me one more minute—do you propose to put in the minutes of this proposed Munitions Patent Board, as those are material, I think; you will realize that.

MR. GALLOWAY: I think there are some in that.

MR. KRESEL: All right, we will go along this way then.

Received in evidence and marked "Plaintiff's Exhibit No. 84." (*See Exhibits, Vol. I, page 268.*)

MR. GALLOWAY: Plaintiff next offers in evidence a memorandum of conference between Honorable Thomas Ewing, Chairman of the Munitions Patent Board, and Major A. M. Holcombe.

THE COURT: What is that last name?

MR. GALLOWAY: Major A. M. Holcombe; Lieutenant S. H. Graves, of the Ordnance Department, and Mr. Ramsay Hoguet, Patent Counsel of the Alien Property Custodian, of April 23, 1919.

THE COURT: Admitted.

Received in evidence and marked "Plaintiff's Exhibit No. 85." (*See Exhibits, Vol. I, page 269.*)

MR. BOGGS: Mr. Galloway, have you our stipulation number on that?

MR. GALLOWAY: 205.

MR. KRESEL: 205 or 209?

MR. GALLOWAY: 210, Mr. Boggs. Here is an extra copy.

The following papers were submitted to Mr.

Ewing in advance of the conference: Captain Swenarton's letter of April 16, 1919, to Lieutenant Graves; Major Holcombe's letter to Mr. Prindle, of April 18th, Mr. Dorr's letter in reply thereto, April 18, 1919; Lieutenant Graves, as to endorsement on Captain Swenarton's letter; letter from Mr. Hoguet to Major Holcombe, dated April 21, 1919; Mr. Ewing stated that in the absence of some express provision in the Peace Treaty (reading).

Mr. Mahaffy: If the Court please, may it be understood that these documents, the two prior ones and this one, are admitted subject to the general objection?

The Court: That is true, not only of these two, but of all documents.

Mr. Mahaffy: Unless there is some special objection.

The Court: Unless the counsel for the respective parties change their position, there is no evidence that I can conceive of in this case that is admissible on either side in view of the opposite side, save only such testimony as may be presented by the defendant with respect to the actual value of the German patents, when sold, and so on. All other testimony is admitted subject to any objection that may be reflected by the opening arguments on either side.

Mr. Kresel: The observation is peculiarly fitting at this time, in view of this last exhibit that was just read. Of course, your Honor, under no circumstances can this defendant or the Alien Property Custodian be bound by Mr. Ewing's legal opinion as to what he could or could not do. I do not know who Mr. Ewing is.

Mr. Galloway: You say that you do not know who Mr. Ewing was?

MR. KRESEL: I do not know the gentleman at all.

MR. GALLOWAY: It was stipulated that he was the Chairman of the Munitions Patent Board.

THE COURT: Even if he is, you do not contend, as of course, that his views—I do not know just the purpose of the last argument, so when it comes time to argue I should be glad to have that pointed out.

MR. GALLOWAY: The plaintiff next introduces a letter from the Chief of Ordnance to the Assistant Secretary of War dated February 7, 1919, with reference to sales of enemy-owned patents, by the Alien Property Custodian.

Received in evidence and marked "Plaintiff's Exhibit No. 86." (*See Exhibits, Vol. I, page 272.*)

THE COURT: What is the purpose of that? Are you going to read it?

MR. GALLOWAY: I am only going to read a very small portion of that, if your Honor please.

THE COURT: Won't you tell me where we are pointing, or what you are offering these documents to support?

MR. KRESEL: That was my suggestion.

THE COURT: Because I am dealing in the dark and if you will, I wish you would help me out.

MR. GALLOWAY: If your Honor please, I think we will show with reference to the Haber patents and the correspondence coming out of the War Department upon this question, that these patents the War Department wanted, that The Chemical Foundation got them at a certain consideration, and that the Government of the United States at the time of that transfer was ready to pay more money for them, which we think goes materially

to the question of value, as well as other questions material in this case.

THE COURT: Then it deals with value?

MR. GALLOWAY: It deals with value largely, it deals largely upon the aspect of value and we think upon other aspects of this case. We think it deals also with the question that the President of the United States at the time that the Executive order of Frank L. Polk was signed, did not, and did not at the time of these other Executive orders, have full knowledge of the facts relative to this sale.

MR. ANDERSON: It goes to the purpose, if I may suggest to my associate, that it is stated here that The Chemical Foundation was acting in the public interests in taking over these patents, for the protection of the public, and if it should appear at the very time they were taken over, the Government was trying to get these patents itself, and the Chemical Foundation took them for less than the Government was willing to pay, it is responsive to that allegation.

THE COURT: Less than the Government was willing to pay?

MR. ANDERSON: They took them over at a price less than the Government was willing to pay. It not only shows they were not acting in the public interest, but that they were acting against the public interest, and the Government is supposed to represent the public interest.

MR. KRESEL: I am sure, your Honor, that Colonel Anderson and Mr. Galloway would not make any statement that they did not believe was a fact; but a very important feature of this case must have escaped us if there is any evidence that will be presented to your Honor that the Government of the United States was offering to

pay any price whatsoever. But it seems to me that the statement that should be made to your Honor——

THE COURT: I wonder if I can trouble you there?

MR. KRESEL: Certainly.

THE COURT: May I interrupt you there? Because there comes another one of my difficulties. Does this evidence indicate from your viewpoint that the Government of the United States was prepared to buy these patents from the Alien Property Custodian?

MR. ANDERSON: Leading directly up to that, now I am going to show in a moment, notwithstanding Mr. Kresel's suggestion to the contrary, that the President actually authorized their purchase at a price four times what The Chemical Foundation paid for them. The President himself over his own signature; and before this sale was made, and after the Executive Order was entered. We will show it all. Therefore, suppose I make this suggestion to Mr. Kresel, as he thinks we have not the evidence—suppose we go ahead and put it in and then see.

THE COURT: My difficulty, and the reason I asked the question was whether the United States, being the antagonist of the German Government, could not only seize but could buy from itself. I had been under the impression that if there had been such a seizure and confiscation by the United States—that is a refusal to deliver up title—then the compensation would be purely a question between Germany and the United States and not a question between the United States and its Alien Property Custodian, and that was my difficulty.

MR. ANDERSON: May I suggest a reply to that suggestion?

THE COURT: Yes, I would be very glad if you would.

MR. ANDERSON: The Alien Property Custodian was trustee under the Act of Congress for whomsoever it might concern. Our contention is, and I think the Act clearly shows, that there was no intention to confiscate this property at all, and therefore if the Government itself desired to acquire this property for the Government's use as distinguished from the general and inchoate trust under which it was held, then it would have to take proceedings to acquire it from the Alien Property Custodian, for its use, just as any one else would. It might use the property and then in the final Peace Treaty have taken a waiver of all claims for infringement; it might have done various things, it might have acquired title to these patents. Then the question would have come up as a matter of negotiation whether the price paid was a fair price. You see, the Trust had never been executed.

THE COURT: The question is still open as I understand it.

MR. ANDERSON: Certainly it is still open.

THE COURT: The sales price does not conclude the question between Germany and the United States, as I understand it, in your opinion.

MR. ANDERSON: No, sir; and the Act expressly provides that any property sold under this Act, except when sold to the United States, shall be sold at public auction, thus showing that the Act contemplated that where the United States desired to acquire property under this Act, it was to acquire it by sale and by purchase. We will show by this evidence that it did desire to acquire certain property and that the President actually authorized its acquisition for a certain sum in con-

nection with the development of these nitrate plants at Muscle Shoals and Sheffield.

THE COURT: Now will you proceed, Mr. Kresel?

MR. KRESEL: I do not want your Honor to misunderstand me. That is my only purpose in making any reply to Colonel Anderson's statement.

I do not yet understand Colonel Anderson to claim that the Government was offering to purchase these patents from the Alien Property Custodian, for a price, I do not care what it was, and that the Alien Property Custodian refused to sell the patents to the Government, and over the protest of the Government, sold them to The Chemical Foundation. That is what I said I did not understand, that any such claim had ever been made; and I am surprised now that any such claim is made. Of course, my surprise goes for naught if they have the proof, and I shall be very anxious to hear what proof they have of that.

MR. ANDERSON: Mr. Kresel, in order to show the relevancy of this evidence, without at this time reading it into the evidence, if your Honor will permit it to be left off, and the stenographer not take down this statement, I will say: (Mr. Anderson then made a statement off the record.)

MR. KRESEL: I think, under your Honor's ruling, this evidence would go in any way and I did not understand that we were discussing the question of the admissibility of the evidence.

I was challenging Colonel Anderson's statement that there was any evidence that the Government of the United States desired any of these patents from the Alien Property Custodian for any price smaller or greater than what the Chemical Foundation paid and that the Alien Property

Custodian declined to give them to the Government. I do not yet see that anything Colonel Anderson has read goes to substantiate in the slightest degree the statement made by him.

On the contrary, I say to your Honor now that when all his evidence is in, your Honor will find that the Secretary of War and this Munitions Patents Board decided that they did not want to take the patents from the Government, that the Government did not want to own the patents, that the Government insisted upon having a license rather than owning the patents, and that it was pursuant to that request that not only did the Alien Property Custodian give to the Navy Department a license covering 5,700 patents which never went to the Chemical Foundation at all, but pursuant to that request, the Chemical Foundation at the request of the Alien Property Custodian gave to the Government a license which I referred to in my opening statement covering all the patents that it took over.

That is the reason why, your Honor, I suggested when Mr. Galloway started reading this line of correspondence, that a statement be made to your Honor so that you could understand the relevancy of this. You will find that the eventual decision of the War Department authorities, notwithstanding anything that went before, that what they wanted was a license and not to own the patents.

MR. ANDERSON: Now then, I will make the statement on the record, as long as counsel has made his statement on the record. We shall prove, if they want, that before these Haber patents for fixation of nitrogen were ever turned over to the Chemical Foundation, the authorized and qualified offices of the Government did advise

the Alien Property Custodian that the Government of the United States desired to acquire them and that they were necessary in connection with its Muscle Shoals and Sheffield development on which it was spending millions of dollars; that in pursuance of that desire, as they claim and the correspondence indicates, a promise on the part of the Alien Property Custodian was made to let them have them; that they were seized and sold by the Alien Property Custodian to the Chemical Foundation; and that while that seizure was going on and at the very time your Honor will recall before the actual assignment took place on April 10th, and after the seizure in March, the President himself authorized the expenditure of $10,000 and additional funds for investigation for the use of these patents in connection with Muscle Shoals; that when they went back to get these patents from the Alien Property Custodian they were told that they had been sold to the Chemical Foundation and that they could go to the Chemical Foundation for a license; that the officers of the War Department were outraged and their correspondence so shows——

THE COURT: Were what?

MR. ANDERSON: Were outraged at what they regarded as the failure to give them the protection they had expected; but being left to no other resort, they went to the Chemical Foundation and asked for a license to use these patents; that in the face of the Act of Congress, authorizing the Government of the United States to construct the plant at Muscle Shoals and to sell the surplus nitrogen produced for commercial purposes, fertilizer purposes, in the interest of agriculture, the Chemical Foundation replied that they would not license these patents to the United States Govern-

ment except upon an express limitation that the stuff produced under these patents would be only for Government use and that they could not sell it for commercial purposes or allow any contractor to use these patents for the production of stuff for the Government itself; that it was only for the Government use and that the product must be used exclusively by the Government—which made the operation of Muscle Shoals absolutely impossible, standing idle today, and that The Chemical Foundation refused a license under those conditions and that the Government of the United States with a $20,000,000 or $100,000,000 plant, or whatever it was, suspended in mid-air because they could not get a license under which they could operate. That is the purpose of this evidence. Your Honor has it clear now, I think. I was not going to anticipate it, but I will state it on the record.

THE COURT: I am glad you did, because I could not properly weigh it as it stood, unless I had known the ultimate purpose of it.

MR. ANDERSON: Certainly, sir.

MR. KRESEL: You know, I enjoy arguing with Colonel Anderson so much that I cannot refrain from answering him if your Honor will permit me.

MR. ANDERSON: That applies to both of us, then.

MR. KRESEL: May I make one observation. Colonel Anderson is speaking of the Muscle Shoals plant. He knows that the Muscle Shoals plant is not working under the Haber process at all. It is known as the cyanamic process, which has nothing to do with the Haber patent.

MR. ANDERSON: That may be a question.

THE COURT: You do not seem to be any closer on this than on other things.

MR. ANDERSON: I am prepared to say in reply that plant No. 1 is for synthetic processes, and I have Mr. Garvan's statement that it cannot be used without the Haber patents. I am taking Mr. Garvan's own statement for that.

THE COURT: You may proceed with the exhibits, Mr. Galloway.

MR. KRESEL: At least we have enlightened the Court to some extent.

THE COURT: You may state the contents of those documents in so far as possible, without reading them into the record.

MR. GALLOWAY: I shall do so. This is a letter from Major General C. C. Williams, Chief of Ordnance of the United States Army, to the Assistant Secretary of War, dated February 7, 1919, in which, among other things—it is entitled, "Subject: Enemy-owned patents pertaining to munitions." Among other things, this letter sets out that they had received unofficial information concerning recent sales of corporations by the Alien Property Custodian, including patents, especially a number relating to chemical processes and some of which may be more or less directly involved in the manufacture of munitions, and that they are not informed as to whether the right of the United States Government to use these patents has been protected, and that if that is not taken care of probably the United States will have to pay large royalties upon such patents which are now being purchased at reasonable rates from the Alien Property Custodian, and that it is also conceivable that private parties or corporations purchasing these patents might through the control of an industry or any certain process, restrict the development of that industry and process and control the need of the United States. I had better

read this part. I would rather read that in there, because it is pretty important. (Reads from Plaintiff's Exhibit No. 86.) And then it goes on and states that, having no direct rights under the patent the Government would be handicapped and embarrassed if this should continue. It says that in regard to most of them it is essential that the United States should be assured that adequate facility and experience for working these processes are available in the United States. (Continues reading Plaintiff's Exhibit No. 86.)

MR. BOGGS: Pardon me, Mr. Galloway, what is the stipulation on this last one?

MR. GALLOWAY: That is 205, and the next I am coming to is 110, Mr. Boggs.

The plaintiff next offers in evidence a letter dated February 11, 1919, from A. M. Holcombe, Major, Ordnance Department, and representative of the Munitions Patents Board, to the Alien Property Custodian.

THE COURT: Admitted.

Received in evidence and marked "Plaintiff's Exhibit No. 87." (*See Exhibits, Vol. I, page 274.*)

MR. GALLOWAY: I ask that the same may be read as Plaintiff's Exhibit No. 87. If your Honor please, this letter states that Major Holcombe at the request of the Assistant Secretary of War asks for a conference with the Alien Property Custodian with reference to the seizure and disposal of enemy-owned patents, in order to secure protection for the interests of the United States, and states that this matter has been discussed informally with Mr. Hoguet, of the Custodian's office, "who has given assurance that no sale of any enemy-owned patents of any class relating to munitions or materials entering into the prosecution of the war will be made by you in advance

of notice thereof to the War Department." It goes on to state that Mr. Hoguet has suggested that a list of enemy-owned patents in which the War Department was interested might be prepared, and that in view of the large numbers this was not practicable.

MR. KRESEL: Would you mind reading the fourth paragraph of that exhibit?

MR. GALLOWAY: (Reads from Plaintiff's Exhibit No. 87).

MR. KRESEL: That is all. That is what I wanted the Court to hear.

MR. GALLOWAY: We are very glad to have it here.

MR. KRESEL: There is no question at all of selling the patents to the Government. It is a question of license.

MR. ANDERSON: Do you not think we ought to wait to argue this out until we get through?

MR. KRESEL: Yes, we ought to.

MR. GALLOWAY: This letter than continues and I better read another paragraph here. (Reading.)

He goes on to state that the interests then of the United States in these patents is considerable because of the extensive use that might have been made of them during the war and that these things are suggested as merely indicative of the great interest of the United States.

THE COURT: Are the 5,700 patents that were referred to a while ago purchased by the United States?

MR. GALLOWAY: They were purchased by the United States.

MR. KRESEL: No, a license was given.

MR. GALLOWAY: A license, yes.

MR. KRESEL: They were not purchased at all by the Government.

THE COURT: Were any enemy Alien patents bought by the United States at any time?

MR. GALLOWAY: I cannot answer that.

MR. KRESEL: With reference to the 5,700 patents, as long as the Court has inquired, I am sure there can not be any difference about the fact. The Government paid to the Alien Property Custodian $100,000, for which it received a free license during the life of those patents and release for any claim for damages for infringement of those patents and all other patents owned, taken over by the Alien Property Custodian during the war. That is the fact.

MR. GALLOWAY: I do not think we can agree that license was broad enough to include all others.

MR. KRESEL: I did not say the license. I said the release. The license covered the 5,700 patents.

MR. ANDERSON: It was a non-exclusive license.

MR. KRESEL: Certainly. A non-exclusive license.

MR. GALLOWAY: Another thing, the release you refer to was a release that was executed without any consideration at all, as to the Alien Property Custodian, on April 10, 1919.

MR. KRESEL: No, Mr. Galloway.

MR. GALLOWAY: There was another release executed without any consideration.

MR. KRESEL: You are mistaken, Mr. Galloway, but the Court has inquired with reference to the 5,700 patents.

MR. ANDERSON: Of course, your Honor will understand we do not admit the correctness of Mr. Kresel's statement on the record.

THE COURT: I am having just a little difficulty

in working out in my own mind; it may be perfectly clear to you and the rest of you, it is not to me yet—just how any negotiations between the United States Government and the Alien Property Custodian amounted to anything. It may be entirely clear. It seems to me that is entirely a question that may be entirely clear to you but is not entirely clear to me. It seems to me that is a question like the combination of the alien patents which would be purely a question whether the United States is not going to give them back. It does not have to. It has power to keep them. It would seem to me it is merely a question whether the Government is going to pay Germany or not. That would be a peace controversy and not a judicial controversy.

MR. GALLOWAY: That gets back rather to the question of the meaning of the Act and whether or not it was confiscation.

THE COURT: It may go beyond that. It may be even deeper than that, but you may proceed.

MR. GALLOWAY: The plaintiff next offers in evidence a letter, or a memorandum rather, from the Alien Property Custodian, initialed "A. M. P.," to Mr. Hoguet, dated February 12, 1919; and asks that the same be received in evidence as Plaintiff's Exhibit No. 88.

THE COURT: Admitted.

Received in evidence and marked "Plaintiff's Exhibit No. 88." (*See Exhibits, Vol. I, page 276.*)

MR. GALLOWAY: That is 184, Mr. Boggs, under the stipulation.

This letter, if your Honor please, refers to a meeting that Mr. Palmer had held with these representatives of the War Department and I wish to read this. It is short. (Reading.)

Plaintiff next offers in evidence a memo-

randum by Major A. M. Holcombe, from the files of the War Department, which is a memorandum by him of the same conference.

THE COURT: Admitted.

Received in evidence and marked "Plaintiff's Exhibit No. 89." (*See Exhibits, Vol. I, page 277.*)

MR. BOGGS: What is the date of that, Mr. Galloway?

MR. GALLOWAY: That is February 12, and is No. 111 under the stipulation.

This memorandum is concerning the same interview and says that the interview was held with Mr. Palmer pursuant to instructions—to the memorandum of February 7th, from the assistant director of munitions, that Major Holcombe, Captain Dix and Captain Swenarton, of the Nitrate Division of the Office of Chief of Ordnance, went to the conference; and that they handed Mr. Palmer a letter at that time and that the Alien Property Custodian said that he would be glad to sell to the War Department for a nominal sum, any patents in which the War Department is interested; as had already been done in the case of certain wireless patents in which the Navy Department was interested, but that he did not propose to sell enemy-owned patents to Americans generally, except in connection with the sale of enemy-owned businesses actually carried on in this country or in special cases in which the patents dominated the control of an American industry.

He said that the matter of patents was largely in the hands of Mr. Hoguet, and that he would be glad to have the War Department present to Mr. Hoguet for consideration the form of the purchase agreement for use in disposing of patents to American purchasers which would safe-

guard the interests of the United States in so far as past use is concerned. He did not look with favor upon requiring the purchasers to give the United States free license to use the inventions in the future, but stated that he would consider any recommendations which Mr. Hoguet might make.

He further stated (reading).

THE COURT: Adjourn Court until tomorrow, 8.30 o'clock Standard time.

(Whereupon at 3 o'clock Standard time, the case was adjourned until tomorrow, 12th of June, 1923, at 8.30 o'clock Standard time.)

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SEVENTH DAY.

Wilmington, Delaware,
June 12, 1923, at 8:30 o'clock, a. m.,
Standard Time.

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*Before:*
HON. HUGH M. MORRIS, U. S. District Judge.

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Counsel present as before noted.

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TRIAL RESUMED BEFORE THE COURT.

MR. ANDERSON: If your Honor please, I would ask permission to interrupt the regular order of the evidence this morning, which was dealing with another matter, as Mr. Frank Polk, former Under-Secretary of State is here and I do not wish to keep him any longer than necessary on account of other engagements.

In that connection, I would like to make a brief statement which I think is due myself perhaps and

Mr. Polk, and will ask him to confirm it. When this Bill was being drawn, I had a personal talk with Mr. Polk in New York to ascertain what, if anything, he recalled as to the signing of these orders. At that time he stated to me that he did not have any distinct recollection on the subject and as I recall he said that it was done formally as other matters came before him.

At that time he had not been able to find any correspondence relating to the order at all and Mr. Polk did not know of any, could not locate any. Therefore, from that statement as well as other matters which will appear in evidence and need not be mentioned now, certain allegations were put into the Bill on that ground.

Since that time, Mr. Polk tells me that his memory has been refreshed and he has gone over and made a careful study of the situation and does recall certain matters in connection with it and also has discovered this letter from Mr. Palmer. Therefore, in the ordinary course, he would not be a witness for the Government. He would not be called for the Government. However, I want all the facts, as I stated, to come before the Court; and instead of postponing Mr. Polk's testimony, as it would naturally come in for the defense, I want to ask this morning that he go on the stand and I will just ask him to state the facts as he now recalls them and as the records disclose them, that the Court may have all the facts before it. But I do not want to call him as a Government witness. If I have to do that, I will do that even. But, if your Honor will understand the circumstances, I do not want to be in the position of being bound by his statements as I would ordinarily; and therefore, even under those circumstances, I would call him because Mr. Polk's statements, of course, will be in accordance with his recollection at the present time. I will therefore ask Mr. Polk to take the stand.

MR. KRESEL: Do I understand from this that the Government is asking the Court to rule that the Government is not to be bound by what Mr. Polk may say?

THE COURT: Will you state your position again with respect to that, Colonel Anderson.

MR. ANDERSON: I mean to state this, that at the time Mr. Polk was summoned, I assumed that his evidence would be in accord with his original conversation with me and I want to make it very clear that there is not a suggestion of want of frankness or criticism of Mr. Polk, because I know very well that business men who are busy frequently find things afterwards that they did not know of at the time.

Under those circumstances, I would not ordinarily call Mr. Polk as a witness. But having been summoned, I feel it would not be frank to the Court if I did not let him go on the stand when he came here, even though his memory of the situation was different from what it was at the time that I made the statement.

I could say that I called Mr. Polk as an adverse witness. That would not be true because it would imply that he had a mental adversity to the position of the Government. I do not believe that for a moment and therefore I want the Court to have all the facts in this case. But I do not think, even with that statement, as I ordinarily would not call him, that the Government ought to be required as a matter of accommodation to Mr. Polk to put him on the stand, even though at the present time the Government may wish to take a position adverse to his testimony, from other testimony in the case.

As I stated to the Court, I want to be absolutely frank in this matter, but I want to protect the interests of my client in accordance with the rules of law, and the only way I can do that is to state my position to

the Court frankly and ask the Court what it desires done.

THE COURT: I think you have placed your position on a very broad plane, Colonel Anderson. The only question is the question raised by Mr. Kresel as to whether you may introduce, I assume, other evidence in conflict with that given by Mr. Polk, should you put him on the stand. Now then, I do not understand from your inquiry, Mr. Kresel, that you intend to indicate that the Government may not argue or debate or contend at the conclusion of the case, make any contention that it desires, that is supported by any testimony in this case, whether produced by you or by the Government.

MR. KRESEL: Of course, the Government is entitled to draw any inference or base any argument upon any testimony that is in the case. Of course I do not understand the Government can call a witness and elicit testimony from the witness and then say "We are not bound by what he said."

THE COURT: That is the ordinary rule, of course.

MR. ANDERSON: The ordinary rule, but that is the reason why I want to make my position entirely clear. That is due to Mr. Polk and to the Court. I want the facts to come out, but I do not want to put the Government in a position for this Court or any other Court to say that the Government introduced certain evidence. If I am forced into that position, then, I would have to say frankly to the Court that having ascertained that Mr. Polk's views are different now from those which I originally understood when he was summoned, that I did not desire to call him, and state the reasons; but I do not think it is fair to Mr. Polk, if he is going to testify at any time in the case, to require him to come over here twice for that purpose. I am perfectly willing to have him go on

the stand at this time and we have known the Court itself to call witnesses. I am perfectly willing for the Court to take his evidence.

THE COURT: I do not need to take the initiative in the case when the case is handled by counsel as it is in this case.

MR. ANDERSON: Certainly not.

THE COURT: So that if there is an objection, I shall not change the ordinary rules with respect to the production of witnesses and the binding effect of their testimony. Now, in making that statement, Mr. Kresel, I am not even indicating or suggesting that you are doing anything, even approaching anything improper, in giving any reason and objection to this.

MR. KRESEL: Before we take our position in the matter, I desire to have a little more information from Colonel Anderson as to the respects in which he states Mr. Polk's recollection of the transaction is different now from what he says Mr. Polk stated it was at the time when Colonel Anderson went to see him.

MR. ANDERSON: I shall be very glad to state it.

MR. KRESEL: Pardon me just one minute.

MR. ANDERSON: I beg your pardon.

MR. KRESEL: Your Honor will recall that the allegation in the Complaint is—I think I read it to your Honor yesterday—that facts were misrepresented to Mr. Polk, that essential facts were suppressed from him—

MR. ANDERSON: Not suppressed—withheld.

MR. KRESEL: "Suppressed," I think is the word.

MR. ANDERSON: All right. It is the same thing.

MR. KRESEL: That by means of these representations and suppression of facts he was induced to sign these orders, and that if he had known the facts that had been suppressed from him and had known the true facts, and not those that were misrepresented to him, he would not have signed the orders.

Now, I want to know from Colonel Anderson whether when he saw Mr. Polk, during the time that he was drawing this Bill of Complaint, Mr. Polk told him that facts had been misrepresented to him, that facts had been suppressed from him, that if he had known the true facts he would not have signed those orders. Of course, if that was the statement made to Colonel Anderson by Mr. Polk I can see the justification for the Government now coming in and saying one certain state of facts was represented to us when we were drawing the bill and now, without any reflection on Mr. Polk or anybody else, a different state of facts is represented to us.

MR. ANDERSON: I am perfectly willing to answer Mr. Kresel's question and argument. In the first place, if Mr. Polk goes on the stand—I am perfectly willing without his going on the stand to make the statement as a member of the Bar. I went to see Mr. Polk in New York, he and Mr. John W. Davis and myself were sitting down talking about this matter. I asked him, as far as I can now recall, what was his recollection of what took place. He stated that he had practically no recollection of the matter, it was very indefinite in his mind, he had not investigated it at that time, and that he had no recollection on the subject, except in the most hazy way, if at all. I further asked him if—I will try to get it straight—I think I asked him if the matter of the purpose of this sale was explained to him, and he said as far as he could remember the order was signed as a formal matter that went through the office, that he was very busy, and that he had all these duties imposed upon him at that time, and that it was signed as a formal matter, like anything else, he had no further recollection on the subject.

The allegations of the Bill are to the effect that facts were withheld, because if no further facts than that were disclosed to Mr. Polk to make any impression

on his mind, the other facts in the case that we knew then were not disclosed and were withheld, and the conclusion that I have stated there—and I shall also, and did in my opening statement indicate that I would argue that the face of the order itself indicated that the facts were misrepresented. I do not mean to say intentionally, I do not mean to say a fraud was worked on Mr. Polk. I am not saying that now and I hope I won't have to say it, as I stated before. But the other conclusions are conclusions drawn from the whole facts as they were before me, in connection with the fact that Mr. Polk had no recollection of any of these matters being brought specifically to his attention.

I think that is a fair statement. There was quite a long discussion between us on the subject, but I believe Mr. Polk will bear me out that that is a fair statement of what took place between us and is within what took place between us.

Now, under those circumstances I made the allegations in the bill, or the Government made the allegations in the bill, drawn from all the record and all the facts and circumstances; and, therefore, if now Mr. Polk, in making an investigation of this subject finds that his then recollection is different now—which very many men do, and I might or anyone else—and going over this record completely recalls certain things, then I want those facts to go before the Court. But I do not want it to appear that the Government calls him as a witness to disprove the facts.

THE COURT: I am sure that I understand your mental attitude on one thing, Colonel Anderson.

MR. ANDERSON: Yes, sir.

THE COURT: And, that is, let me assume that Mr. Polk's recollection is different now; that is, his recollection has been refreshed, and he recalls the transaction.

MR. ANDERSON: Yes.

THE COURT: I can very readily understand how a man having so many transactions lets one transaction escape his mind.

MR. ANDERSON: Yes.

THE COURT: I recall being on the witness stand myself when a fact that was clearly documentary escaped my attention and I recalled it from a record. Do I understand that should Mr. Polk's testimony not support the allegations in your bill, that you would call other witnesses to support those allegations?

MR. ANDERSON: At the present time, if your Honor please, I do not know of any other testimony that we could put in which would be in direct conflict with that position; because I do not think I can bring anybody probably to testify what Mr. Polk recollected. Therefore, I do not think the direct conflict would arise. But your Honor knows how often the Courts say the plaintiff's own testimony shows so and so, and ordinarily if I had that experience and had examined a witness under your Honor's subpoena I would complain to the Court and say that under the circumstances I did not want to call that witness. But this witness is of a different type and I felt that frankness required me, and the method under which I am conducting this case, to come before the Court and state the whole facts.

MR. KRESEL: I think Colonel Anderson's position is admirable, and I am quite certain, your Honor, if Colonel Anderson had had the information before him that he now has, that allegation in the bill would not have appeared.

MR. ANDERSON: That is a matter I will argue later.

MR. KRESEL: But with the information that we now have as to what took place between Colonel Anderson and Mr. Polk at their interview, I cannot yet see, your Honor, how the statement of a witness that he had no recollection can be made the basis of an al-

legation that misrepresentations were made to him and that facts were suppressed from him and that if he had known the true facts he would not have acted in that way.

Colonel Anderson can do one of two things: He can either withdraw that allegation or, if he desires, he can put Mr. Polk on in the regular way and be bound by what he says; and I will say to Colonel Anderson now that if he declines to put Mr. Polk on and declines to withdraw the allegation in the complaint, then in due time when our case comes on we shall put Mr. Polk on. Now, that is our position.

MR. ANDERSON: Then, if your Honor please, I do not withdraw the allegation, because I think the record in this case will support the allegation—justify the allegation. But with the statement which I have now made upon the record explaining my position, and as a convenience to Mr. Polk, who is a very busy man and entitled to every consideration, if Mr. Kresel takes that position, in order to prevent him from having to come back here at a later stage in this case, I will call Mr. Polk and take the risk of his testimony.

THE COURT: I assume that you do not mean any substantial criticism of Mr. Kresel's position—

MR. ANDERSON: Not at all, because he is acting within his rights.

THE COURT: Because he has the duty of protecting his clients.

MR. ANDERSON: Not at all; he is acting within his rights entirely. I have not criticised counsel and do not mean to; but I mean if he feels obligated, probably it would be better to take that position, have Mr. Polk come back later, when for the convenience of Mr. Polk I am going to take the chance and let the Court have the facts. With that explanation on the record I take his testimony.

THE COURT: Of course, the interests of Mr. Kresel's client have a greater weight than Mr. Polk's convenience.

MR. ANDERSON: Of course, and the interest of the Government I do not think will suffer.

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## FRANK L. POLK.

FRANK L. POLK, a witness called on behalf of the plaintiff, being duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. ANDERSON:

Q. 1. Mr. Polk, will you please state on the record your full name and place of residence?

A. Frank L. Polk, New York City.

Q. 2. You were during 1918 and 1919 Under-Secretary of State of the United States, were you not?

A. Counsellor for Department of State up to July 1, 1919, and from that time on Under-Secretary of State. It was the same office, but at the time it was changed.

Q. 3. Yes, I know. And during the absence of the Secretary of State in Paris after December 3rd until the middle of the next year you were Acting Secretary of State?

A. Yes, sir.

MR. KRESEL: December 3, 1918?

MR. ANDERSON: Yes, December 3, 1918.

Q. 4. Mr. Polk, you are generally familiar with the questions involved in this case, are you not? I mean the controversy here.

A. In a general way.

Q. 4-a. It appears from the exhibits filed with the answer in this case that about December 3, 1918, the President on his departure for Paris signed an

Executive order by which he vested or undertook to vest in you all the power and authority given by the Trading with the Enemy Act to issue Executive orders under Section 12 of that act except as expressed in the order itself. You recall that circumstance?

A. Yes, sir.

Q. 5. It also appears that acting or purporting to act in pursuance of that authority you issued two orders signed by yourself—which I will show you if you wish, but undoubtedly you are familiar with them. —one dated February 26, 1919, and the other dated April 3, 1919, in relation to the sale by the Alien Property Custodian of certain former enemy-owned patents which had been seized by him, the sale to be to The Chemical Foundation, Incorporated, the defendant here. I should be very glad if you would state to the Court the facts in connection with the signing of that order and present any correspondence you may have dealing with that subject, and make the full statement, and in that connection, if you would do so—you have heard my statement at the Bar—would you make any statement on that subject which you desire to make?

A. I am very glad of the opportunity, Colonel. May I look at a copy of the order?

MR. KRESEL: Just a minute, please.

THE COURT: You may refresh your recollection in any way you desire.

MR. KRESEL: Just a minute before the witness answers the question. The defendant objects to the question upon the ground that it is immaterial, irrelevant and incompetent, on the ground that it is an effort by testimony about to be introduced to have the Court pass upon a matter which by act of Government was given into the discretion of the President acting through such officers as the President may appoint according to that act, and that such discretion was exercised by the

President acting through such officers as he appointed; that, therefore, the act of the President is one that the judiciary can not interfere with or review. In support of this objection, we desire your Honor to take into consideration and to consider as specifically urged the grounds urged by Mr. Guthrie in his argument before your Honor upon this very question of the non-justiciability of the question here presented.

MR. ANDERSON: Then, if your Honor please, the question is withdrawn. I am through with the witness.

MR. KRESEL: That is all, Mr. Polk.

THE COURT: You mean, Colonel Anderson, that I should take that as a waiver of your position?

MR. ANDERSON: No, sir. I insist upon my legal position, that if the question is objected to, I withdraw it.

MR. KRESEL: It seems to me, your Honor, we have come to a place now where we might as well understand the Government's position. The Government can not blow hot and cold here. Our position has been made perfectly clear from the outset, that we contend the Court has no jurisdiction to review the act which the Government has asked the Court to review.

The Government has come in here by its Complaint and has sought to have the Court review this act. They have called a witness here and have sought to elicit from him evidence in support of the allegations in their Bill. We take our objection, as we have a right to, in order to support the position that we have taken. The Government says to your Honor now, "Well, if that is the position of the defendant, we won't bring out this testimony."

It seems to me that all this question of frankness with the Court must be somewhat discounted if those are going to be the tactics of the Government. They either ask the Court to review these acts of the President or they don't.

THE COURT: Your position has been made clear from the beginning and that, as I understand you, is one of the crucial contentions that you shall urge and have urged.

MR. KRESEL: Certainly.

THE COURT: Now then, as to whether, however, in the absence of a specific objection when the question is clearly and definitely presented, the Government wants to take a position antagonistic to your position is for it to determine and not for him.

MR. KRESEL: Certainly.

MR. ANDERSON: I want to make my position clear, since counsel desires to raise a question as to the frankness of the Government. I have offerred this evidence and have stated my reasons for offering it. If it is not objected to, I am perfectly willing for it to go in. If it is objected to, I do not have to press the question.

THE COURT: You do not. But can you require the defendant to withdraw any objection if you have exercised your option of withdrawing the witness instead? But it seems to me, Colonel Anderson, that the witness having been called, the control of your case is in your hands. I am not criticizing your suggestion, but it seems to me possibly that in the ultimate determination of this case, I will be confronted with this fact. What my conclusion may be, I do not know and I do not intend to prophesy. It seems to me that I will be confronted with this condition.

The Government contends by its allegation in its Bill, and by its position in open Court up to this point, and made clear and very clear in your opening statement, Colonel Anderson, that it is within the power of the judiciary to determine, under the facts of this case, as to whether the orders made by Mr. Polk and by the President are subject to review by the Courts for the reasons stated in the Bill.

The answer of Mr. Kresel to that, and Mr. Guthrie, throughout has been, before we reached that point, that the Courts must stop, that they have no power to review executive acts, that the Courts have no power to review the executive discretion. Now then, we have met just now for the first time on that issue, more substantially now than heretofore. If you withdraw from that position when it is forcefully challenged, I do not undertake to say what the psychological effect may be as well as the legal effect.

MR. ANDERSON: The question here is on an objection to particular evidence. I can present any evidence to support my position on that point, I submit with deference, that I may see fit. The evidence is documentary, as a matter of fact, on that subject and I was going to put in certain documentary evidence which under stipulation I am entitled to read in without identification on this subject.

I would like to have your Honor rule now, to raise the question whether my failure to insist upon the oral testimony of Mr. Polk can affect in any way my legal right to urge that the Court can look into those questions upon such evidence as I may present.

MR. KRESEL: That is a moot question, your Honor. I am in no position to argue that; and,

of course, your Honor is not going to rule upon such a moot question.

THE COURT: That is the difficulty.

MR. ANDERSON: The question I submit is presented by the insistence of my putting this witness on the stand.

THE COURT: No, I am not insisting that you put him on the stand. I was just wondering whether there was any legal ground which would prevent your arguing or presenting the question with the full force that you might in other conditions. But I have no conclusions about it. I will make some when it becomes necessary. But the point is not now presented, so you are entirely within your rights and I do not know that you will be damaged. I only wanted you to consider that now. It is not for me to consider, but for you to consider. I do not know that you are in any danger, Colonel Anderson.

MR. ANDERSON: I am very frank to say that I think I am well within my rights in presenting any other evidence as to any question raised here. If any question is raised here, I have said at the beginning and I say now that I want all the facts in this case to come out, but I do not feel obligated to bring facts out over objection.

THE COURT: Of course, you are not.

MR. ANDERSON: (Continuing) That are adverse to the Government or may be regarded as adverse to the Government. However, I am going to resolve every doubt in this case in favor of the Court having all the facts, and therefore I will recall Mr. Polk and ask him to answer the question in view of that fact.

FRANK L. POLK recalled.

THE COURT: Do you recall the question?

THE WITNESS: Yes, I recall the question.

MR. KRESEL: I understand your Honor overrules my objection.

THE COURT: Without finally determining that issue, which is one of the crucial ones of the case, as I understand it, I shall take this testimony and overrule the objection under your general and specific objections.

A. (to Question No. 5.)

THE WITNESS: In February, 1919, February 26th, a letter was sent me from the Alien Property Custodian's office, signed by Mr. A. Mitchell Palmer, then Alien Property Custodian, in regard to an order which he desired that I should sign. I have the original letter here. The letter was brought over by one of the legal force of the Alien Property Custodian's office. Who it was, I do not recall. With the letter came the proof sheets of the report that Mr. Palmer had prepared dealing with this subject, and he called my attention in the letter to certain pages—certain paragraphs—of the report. I read the letter, read the particular pages he called my attention to, and skimmed over very hurriedly the other part of the report, taking one or two high points.

Later in the day, Mr. Palmer either came over to see me, or we got in touch over the telephone, I am not quite clear which it was, and we discussed the matter at some length, the question of my signing this particular order permitting him to sell at a private sale certain patents. I remember that in our talk I asked the question whether this had been approved, this particular sale had been approved by his so-called Sales Committee, consisting of Mr. Bannard, Mr. Dodge, Mr. Griswold, Judge Ingraham, and one other. He said it had been. I signed the order. I forgot

to state he explained to me why it was necessary for me to sign the order. The President had just returned from abroad the day before or the day before that, and he was tremendously pressed with a great deal of executive work, and it was towards the end of the session of Congress. There was a deadlock. Legislative deadlock. He was having to see a great many Senators and Congressmen in order to get through the necessary appropriation bills, and the situation was such at the White House that it was very difficult to get him to give the time to consider this particular question, so that was the reason Mr. Palmer advanced for my signing the order, and I signed the order.

Q. 6. Would you let me see that letter?

A. Yes, sir, that is the original, Colonel.

Q. 6-a. This is the original letter from Mr. Palmer to you, transmitting the order?

A. Transmitting the order, yes, sir.

MR. ANDERSON: If your Honor please, the plaintiff offers in evidence letter from Honorable A. Mitchell Palmer to Honorable Frank L. Polk, dated February 26, 1919, which has been identified by the witness, and asks that it be identified and read as Plaintiff's Exhibit No. 90.

Received in evidence and marked "Plaintiff's Exhibit No. 90." (*See Exhibits, Vol. I, page 279.*)

MR. KRESEL: We will substitute a copy.

MR. ANDERSON: We will substitute a copy. I will hand it back to him with leave to substitute a copy.

THE COURT: Is there any objection?

MR. KRESEL: Yes, your Honor, we raise the same objection, and in order that I may not interrupt again during Mr. Polk's testimony with similar objection, may it be understood that our objection heretofore urged lies to the entire tes-

timony that is about to be given by Mr. Polk upon this subject.

THE COURT: I understand.

MR. KRESEL: And that we may have an exception to your Honor's ruling.

THE COURT: Yes, your exception applies to all like cases.

THE WITNESS: If your Honor will permit me, I would like to refer to Mr. Anderson's statement.

MR. ANDERSON: One minute. Let me get this letter—Plaintiff's Exhibit No. 90?

THE COURT: Plaintiff's Exhibit No. 90.

MR. ANDERSON: In order to return this letter to Mr. Polk, I will, with permission of counsel, sign and copy the signature on the bottom of a copy, and file the copy.

MR. KRESEL: Yes.

THE COURT: Have they been compared?

MR. KRESEL: I assume that it is a correct copy. I have not compared it, but I am quite sure that it is a correct copy.

MR. GALLOWAY: It is subject to correction anyhow under the stipulation.

MR. KRESEL: It is subject to correction anyhow.

MR. ANDERSON: In order to make it clear, that it is a copy, if your Honor will permit me, and the stenographer not take it down, I will read the letter and have the Clerk compare it right now.

THE COURT: Will you give it to Mr. Kresel?

MR. ANDERSON: Yes. (Handing to Mr. Kresel, and reading.)

Q. 7. Now, you can proceed with your statement, Mr. Polk?

A. Colonel Anderson referred to the visit he paid me last fall, when he had a talk in my partner's, Mr. John Davis' room, in regard to this case. He told

me he had been retained by the Government, and asked me what my recollection was. I told him that my recollection was very vague, that I signed a great many orders, I remembered this particular transaction in a vague way, but none of the details. Later on—as a matter of fact, I think it was after your office, or possibly Mr. Kresel, within the last two months, supplied me with a copy of the letter that has just been read. I was then able to refresh my recollection and I went through my papers and found the original letter and the report referred to in the letter was sent me. I then read the report, and in that way I was able to piece together a story, and my recollection was considerably refreshed.

Q. 8. You heard my statement at the Bar this morning, did you not, of our conversation?

A. I did.

Q. 9. That was substantially correct, was it not?

A. Substantially correct, Colonel, yes. I think I told you, as I recollect, that I had signed a great many of these, while I remembered this particular transaction for the moment, I could not remember the details of it.

Q. 10. All right. That is the same thing. Now, Mr. Polk, it appears—

MR. ANDERSON: At this time, if your Honor please, we will offer in evidence—it is already in evidence.

MR. KRESEL: In the answer.

MR. ANDERSON: That is in evidence. You have introduced it under the stipulation, the order signed by Mr. Polk, to which that letter refers will be found as Exhibit No. 3 with the answer in this case, and under the stipulation is introduced subject to the rule we are following as to objections.

THE COURT: It is now offered?

MR. ANDERSON: It has been introduced already.

MR. KRESEL: I do not recall.

MR. ANDERSON: The stipulation provides that the exhibits with respect to the Bill and Answer are introduced by the respective parties subject to any objection; if there is any question, I will introduce it.

MR. KRESEL: Colonel, we are following a different rule.

MR. ANDERSON: If there is any question we will introduce it.

THE COURT: I think we have been following a different rule.

MR. ANDERSON: I will then introduce the order of Frank L. Polk, dated February 26, 1919, which is in the record as Defendant's Exhibit No. 3 of the printed Bill.

THE COURT: Answer.

MR. KRESEL: Printed Answer.

MR. ANDERSON: With the printed Answer; and to avoid duplication, I will not present another copy, but refer to that, and have it marked as "Plaintiff's Exhibit No. 91."

THE COURT: So admitted.

Received in evidence and marked "Plaintiff's Exhibit No. 91." (Same as Exhibit No. 3 to answer. *See Record, Vol. I, page 551.*)

MR. KRESEL: Do you want to introduce the second one?

MR. ANDERSON: No, I am going to that.

Q. 11. Now, Mr. Polk, it further appears that you signed another order, dated April 5, 1919. Would you state to the Court any recollection that you have about that, and if you have any correspondence relating to that, present it also?

A. That letter was signed by me while I was at White Sulphur Springs.

MR. KRESEL: You mean that Order, you said the letter.

THE WITNESS: That Order. Thank you. I was called up, as I recall, on the long distance telephone by someone from the Alien Property Custodian's office, saying that they had an Order that was necessary to be signed, and asked me when I would be back. I said I would be there two days more, and they said they would send the Order down. They sent the Order down from Washington to White Sulphur Springs, West Virginia, and I signed the Order there. A letter came with the Order, but I have not a copy of the letter. I have not the original letter. I have seen a copy, and the copy I have seen I recall as having received.

MR. ANDERSON: I am getting the copy now, sir.

Q. 12. I hand you a photstat of the letter, dated March 31, 1919, and addressed to Honorable Frank L. Polk, and unsigned. Will counsel admit that this letter was signed by Mr. Garvan (handing to Mr. Kresel)?

MR. KRESEL: I think that is the fact, Colonel. I have a copy here which appears to be signed by Mr. Garvan.

MR. ANDERSON: Just scratch that reference out, will you?

MR. GALLOWAY: Here is a certified copy, Colonel, if you want that. (Handing.)

MR. KRESEL: You do not need a certified copy. There is no question about that.

Q. 13. I hand you herewith a copy of a letter dated March 31, 1919, addressed to yourself and signed by Francis P. Garvan. Would you see if you can iden-

tify that as the letter to which you refer? (Handing to witness.)

A. I recall that letter, Colonel.

MR. ANDERSON: We now offer in evidence copy of a letter dated March 31, 1909, addressed to Honorable Frank L. Polk—

MR. KRESEL: 1919.

MR. ANDERSON: 1919. Signed by Francis P. Garvan; to be read and identified as Plaintiff's Exhibit No. 92.

THE COURT: Admitted under the same conditions as the preceding letter

Received in evidence and marked "Plaintiff's Exhibit No. 92." (*See Exhibits, Vol. I, page 280.*)

MR. ANDERSON: The letter is as follows: (Reading.)

In order to maintain the connection of the record, I would like to offer in evidence under the stipulation, a photostat copy of an original letter from Mr. Ramsay Hoguet to Mansfield Ferry, Esq., of the Alien Property Custodian's office, at Washington, dated New York, April 1, 1919, on the stationery of the Alien Property Custodian, which letter is as follows:

THE COURT: It may be admitted under like conditions.

Received in evidence and marked "Plaintiff's Exhibit No. 93." (*See Exhibits, Vol. I, page 281.*)

MR. ANDERSON: The letter is as follows: (Reading.)

Now, we offer in evidence—have you got that second Order?

MR. KRESEL: Yes (handing).

MR. ANDERSON: We offer in evidence the Order signed by Frank L. Polk, dated the 5th day of April, 1919, filed as Defendant's Exhibit No. 4 with the Answer in this cause, printed page

of Answer 114, to be identified and marked as Plaintiff's Exhibit No. 94.

THE COURT: It is admitted.

Received in evidence and marked "Plaintiff's Exhibit No. 94." (Same as Exhibit No. 4 to answer. *See Record, Vol. I, page 554.*)

Q. 14. Mr. Polk, do you recall any further connection with this matter on your part, any other facts you want to state to the Court?

A. I think not. I think that is everything.

Q. 15. I will ask you if at the time these Orders were signed, and especially the first Order which related to that, you knew or had any knowledge of any negotiations between the War Department and the Alien Property Custodian, looking to the acquisition of the nitrogen fixation patents by the War Department?

A. Not that I can recall.

Q. 16. Did you know what patents, copyrights, trade-marks, or any of them, would be sold under the Order?

A. Well, yes. I knew that they were these German patents controlling the dye and the chemical industry.

Q. 17. And that they were patents that had not been used?

A. That had not been used.

Q. 18. You derived your information on that subject entirely from Mr. Palmer's report and his statements to you, to which you have referred, did you not?

A. Yes, sir.

Q. 19. Did you know at that time the number of patents, or other rights which had been licensed by the Federal Trade Commission, or whether any had been licensed by the Federal Trade Commission?

A. I knew that some had been licensed, but I did not know the number, or which ones.

Q. 20. And you did not know what patents they were, or anything about them?

A. No.

Q. 21. Did you take the matter up at all with the Federal Trade Commission before this Order was signed?

A. Not before the Order was signed, no.

Q. 22. I believe you stated that the source of your information on the subject as related to this Order and its purpose was derived from Mr. Palmer, as to the first Order, and from Mr. Garvan as to the second Order, in the manner you have stated?

A. Yes, in so far as this particular sale was concerned. Of course, I knew something of the dye and chemical patents.

Q. 23. Yes. But I mean the purpose of this Order, you only discussed the matter with Mr. Palmer in connection with his report, and the second Order you only discussed over the telephone with the gentleman in the Alien Property office?

A. In both instances, in addition to that, Colonel, the Orders were brought by some assistant in the Legal Department of the Alien Property Custodian's office, and in each instance I discussed it with the man, whoever it was, who brought the Order.

Q. 24. Could you identify in either instance the person who brought this Order?

A. I thought it was Mr. Ferry; and Mr. Ferry says not. I thought Mr. Ferry brought the second Order, but he said not.

Q. 25. Could you identify in any way the person that brought the first one?

A. No. I could not. I thought Mr. Ferry brought the first or second. He tells me he brought neither one. As I understand it, he says—so he tells me.

Q. 26. What you have said covers completely your knowledge and recollection of this entire transaction and the surrounding facts and circumstances; is that true?

A. Yes, sir.

Q. 27. At the time that you had signed this Order you had never seen the Charter of The Chemical Foundation, had you?

A. No, sir.

Q. 28. Neither of these orders?

A. No, I had not seen that

MR. ANDERSON: I think that is all.

CROSS-EXAMINATION

By MR. KRESEL:

XQ. 29. I do not suppose, Mr. Polk, that you have with you now or can locate the proof of Mr. Palmer's report that came with his letter of February 26th, that was put in evidence this morning, have you?

A. I made a search for it, but could not find it, Mr. Kresel.

XQ. 30. You could not find it?

A. No, sir.

XQ. 31. But it was the proof of what we have been calling here, "The Chemical Section" of Mr. Palmer's report to the President.

A. Yes.

XQ. 32. Now, I will show you Mr. Palmer's report to the President which was transmitted to the President, acording to Plaintiff's Exhibit No. 13—which was transmitted with a letter dated February 22, 1919?

A. February 26th?

XQ. 33. 22nd. The letter of transmittal is dated then. When it was actually transmitted is not yet in evidence; and I will direct your attention to that part of the report which commences with the word "The amendment of November 4th," and will ask you to take a few minutes to glance over that, and to the end of the report, and state whether that is not the portion of the report that Mr. Palmer marked with an "X" as he called it to your attention in this letter?

MR. KRESEL: May I see that letter, please? The one of February 26th, from Mr. Palmer to Mr. Polk. (Handed to Mr. Kresel.)

THE WITNESS: What is the question, Mr. Kresel?

XQ. 34. My question is whether that is the portion of the report that was sent to you in proof form that was especially marked with an "X" to call it especially to your attention, as appears from Mr. Palmer's letter to you?

A. Yes, as I recall it, that is the same thing.

XQ. 35. Now, just hold that there, please, because I shall probably want to ask you some questions about it.

THE COURT: What is the paper that you now hand him?

MR. KRESEL: That is the report and it contains—

THE COURT: Which is in evidence as Exhibit Number what?

MR. KRESEL: The letter of transmittal is in evidence as Plaintiff's Exhibit No. 13, and the portion of the report which is known as the Chemical Section—I do not recall what number that is.

MR. MAHAFFY: Plaintiff's Exhibit No. 12 admitted.

THE COURT: And the portion you there refer to is what?

MR. KRESEL: Is a part of Plaintiff's Exhibit No. 12.

THE COURT: And how can I determine what portion that is?

MR. KRESEL: May the record show then that it is that portion of the report which commences with the words "The amendment of November 4th to the Trading with the Enemy Act presented for the first time an opportunity for what appears

to me to be''—and so on, to the end of the Chemical Section of that report.

XQ. 36. Now, although you can not recall the name of the person who brought Mr. Palmer's letter to you together with the proposed Order that you subsequently signed, and the proof of the report, I understand you to state that it was some one from the Law Department of the Alien Property Custodian's office?

A. That is my recollection.

XQ. 37. And that at least it was a person who knew about this transaction and with whom you then discussed it?

A. Yes.

XQ. 38. I assume that you asked him questions to elicit any information that you wanted, and that he answered them?

A. Yes, my recollection is that most of my conversation—I had some conversation with him—but the conversation on this particular Order was with Mr. Palmer himself.

XQ. 39. Exactly. So that after this proposed Order was brought to you with Mr. Palmer's letter and the proof of the report, you had a conversation with Mr. Palmer, either in your office when he called on you, or over the telephone.

A. Yes.

XQ. 40. You cannot recall which; but whether it was a personal interview or over the telephone, was it on the same day, that is, the 26th of February, 1919?

A. The same day.

XQ. 41. And it is certain that it was before you signed the Order?

A. Yes.

XQ. 42. Of February 26th?

A. Yes.

XQ. 43. From your talk with Mr. Palmer, from your talk with the gentleman that brought the proposed

order to you, and from a reading of the proof of the report which Mr. Palmer sent you, you gained certain information?

A. Yes.

XQ. 44. Before you signed this Order?

A. Yes.

XQ. 45. Did you know at that time and before you signed the Order that it was proposed to sell these patents to the chemical industry?

A. To the Chemical Foundation.

XQ. 46. Incorporated?

A. Chemical Foundation, Incorporated, yes.

XQ. 47. Beside the fact that the name of the concern was The Chemical Foundation, did you know that the purpose was to make this sale in order to make the patents available to the chemical industry of the country?

A. It was so stated.

XQ. 48. Did you know that is was purposed that The Chemical Foundation, Incorporated, was to hold these patents, as is set forth in that report, as trustee for the chemical industry of the country?

A. Yes, as stated in the report.

XQ. 49. Did you know that the voting stock of the corporation, The Chemical Foundation, which was the common stock, was to be placed in a voting trust?

A. Yes.

XQ. 50. Did you know who the voting trustees were to be?

A. Yes.

XQ. 51. Did you know that they were to be the same gentlemen who were the Advisory Sales Committee of the Alien Property Custodian.

A. Yes.

XQ. 52. Did you know any of those gentlemen personally?

A. I knew three.

XQ. 53. Who were they?

A. I knew Judge Ingraham, Mr. Bannard and Mr. Dodge; and I have met Mr. Stone.

XQ. 54. Did you have any confidence in their integrity and honesty of purpose?

MR. ANDERSON: If your Honor please, the character of these gentlemen is not in question here and I do not think the question of whether this witness had confidence in them is material. He knew these gentlemen and nobody is questioning that they are men of character. I do not think that that is the question involved here at all.

MR. KRESEL: We contend that we have a perfect right to show what was in the mind of Mr. Polk when he signed this Order, no matter where he got his information. We have a right to show what it was that moved him to take this action which is now being discussed.

THE COURT: If this testimony is admissible at all.

MR. KRESEL: If it is admissible at all. Of course, it is entirely subject to the objection we have taken.

THE COURT: The objection will be overruled in keeping with our general rule of practice adopted for this case.

XQ. 55. I say, when you were considering this matter, knowing these three men as you say you did, did you have confidence in their integrity and honesty of purpose?

A. I was very much influenced by that—the three men that I did know, their recommendation and the position that they would hold.

XQ. 56. Did you know at that time and before you signed this Order that it was intended that the cor-

poration that was to buy these patents was to issue only non-exclusive licenses?

A. It was so stated.

XQ. 57. And you believed it?

A. Yes.

XQ. 58. Did you know that such non-exclusive licenses were to be issued to any American upon equal terms?

A. Yes. Wait. Let me hear that question again.

XQ. 59. Upon equal terms, I said, and reasonable terms?

A. As stated in the report.

XQ. 60. And was it not also stated to you by Mr. Palmer, when he discussed it with you?

A. I cannot recall that we discussed that particular feature.

XQ. 61. Did you know that the corporation was to grant to the United States, free of charge, a license covering all these patents?

A. Yes.

XQ. 62. That was not only stated in the report that you had before you, but did not Mr. Palmer tell you that?

A. Yes, I recall that, because it affected the Army and Navy. At least I had been told that it would.

XQ. 63. And you know, do you not, that such a license has been given to the Government?

A. I have been told that. I do not know it.

XQ. 64. You knew what the capitalization of this proposed corporation was to be, did you not?

A. Yes.

XQ. 65. You knew that the stock, both preferred and common, was limited to a dividend of six per cent?

A. Yes.

XQ. 66. You knew that it was the purpose of this proposed corporation to use any surplus profits over and above the six per cent. dividend for the advance-

ment of the chemical industry and science in this country

A. It was so stated in the report.

XQ. 67. You knew that Mr. Garvan was to be the first President of the corporation, did you not?

A. I was told that and it was in the report.

XQ. 68. And you knew that there were about 4500 patents that were to be conveyed, did you not?

A. The report stated the number. I had no knowledge other than that.

XQ. 69. And that they were patents that covered the dye industry and chemicals in general?

A. Yes.

XQ. 70. And you knew that all this was being done in order, as it is stated in the report, that this industry might be Americanized, did you not?

A. Yes.

XQ. 71. You knew that the price, I mean the cash price, was to be $250,000, did you not?

A. Yes.

XQ. 72. I want you to turn, if you will, Mr. Polk, to this Order of the 26th of February, 1919.

A. I think I have a copy in my pocket.

XQ. 73. I am looking now at page 112 of the Answer. I direct your attention to the paragraph in your order which is marked "Second." the second reason that you assign for making this Order, which, with his Honor's indulgence, I shall read:

"The Chemical Foundation, Inc., has been incorporated for the purpose of holding letters patent, trade-marks and similar rights relating to the chemical and allied sciences as a trustee for American industry, for the purpose of the Americanization of such industries as may be affected thereby, of eliminating alien interests hostile to said American industries and of the advancement of chemical and allied industry in the United States." Now the next sentence: "The

Chemical Foundation, Inc., is obligated to grant non-exclusive licenses upon equal terms at a uniform royalty to qualified American manufacturers." I would like to stop there a minute. That statement in your order was based not only upon what you found to that effect in the proof of the report that you had before you, before you signed this order, but also upon what Mr. Palmer told you in your interview with him, wasn't it—namely, that the corporation was obligated to issue non-exclusive licenses upon equal terms at a uniform royalty to qualified American manufacturers?

A. Yes, he told me that in substance.

XQ. 74. You say that you had not at that time read the charter of The Chemical Foundation?

A. I had not.

XQ. 75. Was it your understanding when you signed this order that you were signing it upon the agreement contained in that report and the statement made to you by Mr. Palmer?

MR. ANDERSON: I do not think he can testify to his understanding.

MR. KRESEL: Certainly he can.

MR. ANDERSON: He has stated the fact and the Court will draw the conclusion.

MR. KRESEL: I am asking him purposely; because your Honor will recall that Colonel Anderson in his opening statement challenged this portion of Mr. Polk's order and said that it was founded upon a misstatement of fact, and his argument was that because the certificate of incorporation, according to his reading of it, does not bear out this statement, therefore it was founded upon a misstatement of fact.

THE COURT: May I have the question, please?

(The stenographer then repeated Question No. 75 above recorded.)

THE COURT: The agreement made in the re-

port, Mr. Kresel? I am sure I do not understand the meaning of it.

MR. KRESEL: I withdraw that. I do not think that does express the thought I had in mind.

Q. 76. Was it your understanding, Mr. Polk, when you signed this order, that an agreement was being made between the Alien Property Custodian and The Chemical Foundation, Incorporated, whereby the corporation was obligated to issue non-exclusive licenses to all American citizens on equal terms, as stated in your order here?

THE COURT: The same objection or not to that, Mr. Anderson?

MR. ANDERSON: I note the same objection.

THE COURT: Same ruling.

MR. KRESEL: You may answer, Mr. Polk.

A. My understanding was that The Chemical Foundation was bound to grant licenses on equal terms to all American manufacturers.

XQ. 77. Whatever its charter may say to the contrary?

A. Well, I did not—

MR. ANDERSON: If your Honor please, I do not think that is fair. We are not arguing this case.

THE COURT: I think the question is argumentative, Mr. Kresel.

MR. KRESEL: I withdraw it.

XQ. 78. And you also understood, did you not, Mr. Polk, when you signed this order, that The Chemical Foundation, Incorporated, was obligated to give to the United States Government a free license covering these patents?

A. I did not know as they were obligated. I understood that they were to be obligated; put it that way. I did not know that the actual contract had been made.

XQ. 79. Did you, in your discussion with Mr.

Palmer, take up with him or he with you the question of this cash consideration that was being paid and how it was arrived at, and what were the reasons that led to the fixing of that amount?

MR. ANDERSON: If your Honor please, I did not understand the witness to testify to that on the direct. He will have to make him his own witness on that point.

MR. KRESEL: No, I do not concede that I am making him my own witness on anything here.

MR. ANDERSON: All right, I just give the notice on the record. I do not ask the Court to rule.

THE COURT: I think that is in cross-examination, Colonel Anderson. I think your questions were broad enough to open the door to any knowledge or lack of knowledge that Mr. Polk might have had at the time of the sale. I overrule the objection.

A. Let me have the question again, please.

XQ. 80. Would you like to have the question read?

A. Yes, please.

XQ. 81. (Question No. 79 read as recorded above.)

A. We discussed the amount that would be paid, but I do not know that we went at length into the reasons.

XQ. 82. Do you recall Mr. Palmer stating to you several reasons that affected the value of these patents? I will take them up with you in a minute, but I want you to answer if you can the general question first.

A. I recall he laid stress on the fact that the patents had not been used in this country and that in many instances they did not know what they were.

XQ. 83. Or how to use them?

MR. ANDERSON: Now let the witness testify, please.

MR. KRESEL: I thought he had finished. I thought he had finished.

XQ. 84. Had you finished?

A. I had finished. Well, I was—

XQ. 85. Do you not remember, Mr. Polk, that Mr. Palmer pointed out to you that the American chemical industry did not get if they would buy these patents—did not get with the patents what is known in the chemist's parlance as the know-how?

A. No, I do not recall discussing that.

XQ. 86. Namely, the information which would enable any purchaser of the patent to work the patent and get the results; don't you recall his discussing that with you?

A. As I said when I answered the question before, they did not know even what the patents were. Beyond that I do not think we went.

XQ. 87. You recall that you say in your order here as the first reason for the making of it, as follows: "First: Said letters patent, trade-marks and similar rights can not be sold to the best advantage at public sale after public or other advertisement." Colonel Anderson's comment upon that part of your report in his opening statement was that was mere opinion on your part. Now I want to know what information you had before you, from talk with Mr. Palmer, upon which you based the opinion expressed in that paragraph. Do you recall?

A. I do not recall very clearly.

XQ. 88. What is your best recollection?

A. My best recollection was that as to the great body of patents it would be very difficult to sell them in a lump, that if they were sold to individuals the individuals would take the patents to the exclusion of the American market, they might fall into the hands of people that would not use them, that they might be bought up by people who would hold them, not manu-

facture under them, and we would be in the same situation as far as the German patents were concerned as we were before the war.

XQ. 89. Do you remember Mr. Palmer stating to you that the very purpose at the basis of this whole transaction was to break up the German monopoly?

A. Oh, that was clearly the intention.

XQ. 90. And that if he offered these patents at public sale somebody might buy them who would be substituted as the monopoly in the place of the German monopoly?

A. As I expressed the thought, that someone might buy them and not use them.

XQ. 91. Don't you remember that he pointed out to you that under the statute if he sold them at public auction he had to sell them to the highest bidder, no matter who he was, as long as he was an American citizen?

A. I knew that. I do not know whether we discussed it.

XQ. 92. And that such purchaser could take those patents, never work them—

MR. ANDERSON: If your Honor please, I think this is arguing this case with the witness. The witness said that his whole knowledge on this subject was derived from this report which came here and a telephone conversation with Mr. Palmer. Now we have an argument, a discussion by counsel with the witness, and I think it is doubtful whether counsel, with a witness who is reviewing his own trasactions, which position is necessarily adverse to the Government, really has a right to cross-examine him. He must be confined to the rules of direct examination. Here the counsel is testifying in this case and arguing the case with the witness. I think there is a limit, if I may suggest, if your Honor please, to things of that

kind. We are not getting at anything; we are getting argument.

THE COURT: No, I think we are getting two things, Colonel Anderson. You stated first that your allegations of the bill with respect to misinformation or withheld information from Mr. Polk, when he signed his orders, stood. So long as that stands and so long as you open the door, I assume that Mr. Kresel has the power and the right and the privilege of going into that in detail, although you stopped with broad generalities. But is seems to me the direct examination and cross-examination is demonstrating most clearly and forcefully the iniquity of a Court of Justice going into matters affecting and appealing to the discretion of the Executive or his designated agent. I had a clearly open mind on that question when the cross-examination began. I am feeling most strongly that I have erred and seriously erred in opening the door to this question.

Inasmuch, however, as I have opened the door, I am reserving that for consideration after final argument. I shall keep the door open, but it seems to me there could not be a better demonstration of the iniquity of that procedure than that which has taken place here this morning; because if we go beyond the question of power, then we get into the question of international relations and the reasons moving the Executive in designating representatives in such matters, matters with which this Court and so far as I know no other Court has any concern. If it is a question of power, then the Courts have a right to say whether the statutes should be so construed or is open to the construction to give to the President or his designated representative the power to do that which they did do, but as to the things which moved

them apart from the reasons stated in the order, I have grave and serious doubts, and I am almost convinced at this stage of the case that the Courts have no power to go behind the reasons stated in the order. I shall, however, inasmuch as the door has been opened, unless objection be raised by the witness himself for reasons of state, allow this testimony.

THE WITNESS: Your Honor, if I may say so, I am not the one to pass on the question of public policy now. It is very difficult for me to fairly state always the motives that moved me in signing Executive orders. I want to do entire justice to both sides of this case, but it is very difficult for me to state frankly and freely all that then was in my mind.

MR. KRESEL: Your Honor, it is just because of the situation that has been developed by reason of the Government's contentions here that we are trying to search the witness' mind. Of course, I shall not insist that Mr. Polk state anything here that he considers the public interests require should not be stated. I should be the last one to insist on that; and if I did, your Honor would not compel the witness to answer. I know that. But in so far as it is compatible with the public interests that the information should be given, I think we are entitled to have upon the record of the Court here, since the Court is inquiring about it, what the motives were that induced Mr. Polk, acting in the high capacity that he did, to take the action that he did.

THE COURT: Then there is another phase of it which is unusual and which does not occur in many instances, and that is that the United States and not a private litigant is opening the door and asking that the door be opened with respect to

the reasons. In view of the witness's statement, and in view of the fact that it is now several years past, and he has in several instances given you generally the reasons and his recollection of the reasons that moved him to this action, I am wondering whether you have not gone as completely into detail with respect to the reasons moving him to the execution or signing of this Order as may properly be done, as may effectively be done; because the witness has just stated, and he has stated several times, that he had before him certain things, Mr. Palmer's statement and Mr. Palmer's report and Mr. Palmer's letter; that is all.

Now then, there are certain facts which he says he knew himself and necessarily did know. Do not those documents, together with the general statement, weigh as much in favor of or against you as any further detailed testimony that the witness, necessarily having to draw on his reasoning, and necessarily having to draw on vague recollection, as he stated, that he might give.

MR. KRESEL: I shall follow your Honor's suggestion. I shall desist from further inquiry as to particulars, but I do want to ask the witness two or three other questions as to what other general sources of information he had.

THE COURT: May I hear Colonel Anderson before you put that question?

MR. ANDERSON: I wish to state, if your Honor pleases, that there was not a suggestion in my examination, nor is there a suggestion in these Pleadings, of an attack upon the motives of any officer of the Government in signing these Orders; and the reference to motive is purely outside of either the Pleadings of the Government or any statement I have made or any statement I elicited from the witness.

THE COURT: I used the word thoughtlessly, Colonel Anderson, because you have disclaimed throughout any attack upon the motives. But what I meant by that was that you have alleged, as I understand you, and as I recall, that Mr. Polk in signing this Order did so without having had first disclosed to him the complete facts and circumstances with regard to the transaction.

MR. ANDERSON: Yes.

THE COURT: If I used the word "motives," I did it inadvertently.

MR. ANDERSON: As to any examination, either direct or cross-examination, that went to the fact of what was disclosed to Mr. Polk, he stated in concluding his direct examination that all that was disclosed to him was the talk with Mr. Palmer on the telephone, the report to Mr. Palmer, a portion of which he read, and the letter to Mr. Palmer. Those facts that were disclosed to him I concede are the proper subject of inquiry. Matters outside of those disclosures, which do not involve international relations—and it is merely a matter of what was disclosed to him and does not involve any other thing—are subjects of inquiry, as I have pointed out in my argument and will not repeat, as affecting whether or not he acted upon a full knowledge of facts or mistake of facts. That applies to any executive officer in exercising political discretion, which is an entirely different situation.

I want to make very clear here that if the Court has understood that the Government opened by its Pleadings, by its statements, or by its examination, the question or inquiry into political discretion or international relations, or those delicate questions which pertain to the general execu-

tive duties, it was not so intended and it will not be done in this case.

THE COURT: While I understand your statement with respect to that, Colonel Anderson, and while you understand just exactly where that line may be drawn in the trial of this case, because you have undoubtedly given days and weeks of study to the questions that have been raised in this case, I am not sure that I yet see where, in practice, that line is to be drawn. Will you help me on that now?

MR. ANDERSON: I will now; yes, sir. I think the line is to be drawn here. Your Honor can inquire into the facts that were presented to the witness at the time that he signed this Order. Your Honor can inquire into the facts upon which that Order was predicated. I confined my investigation to the facts recited in the Order and to whether he got a letter from Mr. Palmer and whether he examined Mr. Palmer's report, which for the first time today I knew.

On that question, as to the facts presented in the administration of an act for the sale of property held by the United States, in my judgment, it would be a subject for proper examination, even in dealing with the President himself, exercising that delicate care not to go beyond that into other questions which might be of the President's own knowledge.

I do not speak of Mr. Polk's general information on this subject. I have not a doubt that he knew a great deal about the relations between the Germans and the Americans prior to our entering into the war. I claim that to be entirely immaterial.

But he stated that his action in signing this specific Order authorizing a specific sale was predi-

cated upon this letter, the pages of the report of Mr. Palmer, which he was asked to read and did read hurriedly, and skimming as I recall it the remainder of the report, and upon a telephone conversation with Mr. Palmer, the hour and day not identified, but which I will ask him about—as to those matters put up to him we can inquire. But if we undertake to broaden that inquiry into the general international relationships, then I think we would be going into the political powers of the President and not into the specific power delegated to him by this Act of Congress.

THE COURT: I think I understand you, but the difference between you and the defendant with respect to that is, as I understand it, that the Executive Department is a separate and distinct and co-ordinate department of Government with no supervisory power in the judiciary, and, if I understand your position, Mr. Kresel, it is that there is as much lack of power in the judicial department to inquire as to the reasons or the soundness of reasons or the correctness of the statement of fact embodied in those reasons, in the Order of Mr. Polk, as there would be with respect to a certain treaty, for instance. That, as I understand it, is the defendant's position, and that in practice it would be difficult to draw the line.

MR. KRESEL: If your Honor will permit me to state my reasons.

THE COURT: I shall be very glad to have you state them instead of me.

MR. KRESEL: If the Colonel is quite through with his statement.

MR. ANDERSON: No I am not quite through, because I would like to answer the Court's suggestion.

If I may be permitted to suggest, one of the

important functions of the Court is to draw the delicate lines. It is not easy to draw general lines where one starts and the other stops. Therefore, I recognize that the Court approaches with great hesitancy, as every right-thinking man does, as a member of the Bar does, the consideration of these delicate powers of Government. So that, in arguing this question, if even in the earnestness of my position as counsel I should overstate that situation, I do not want the Court to understand that I am in any way wanting in appreciation of the delicacy of the questions presented, and I certainly would not present them if I did not think it was absolutely necessary to the position taken by the Government and its duties.

THE COURT: I have no doubt of that, Colonel Anderson.

MR. ANDERSON: Therefore, with that understanding, I want to say that the delicate line to be drawn there is this: If in the exercise of administrative as distinguished from executive powers or constitutional powers of the President—assuming that Mr. Polk was here authorized to act for the moment, which is a legal question—if in the exercise of those administrative functions which are conferred by Congress and Congress alone—since, as I already called your Honor's attention to the fact this is a Congressional power, that is, the control of alien property, and not an executive power; the President has nothing to do with that, primarily, I may say deferentially, the President's office is not concerned with alien property until Congress acts, and then only to the extent that Congress says—now, then, when the President has appointed an agent Alien Property Custodian or any one else, with limited powers, when in the exercise of those powers as prescribed

by the Act, if it appears that he acted contrary to the intent of the Act with the best of purpose, being badly advised, or mistaken; or if it appears that he acted upon a mistake of material fact, then the Court, in order to determine the validity of the Act, which is a judicial function often calling for the exercise of the most delicate discretion and taste, must inquire into it. As an illustration, I called your Honor's attention the other day to the great case of Lee against the United States, probably one of the most delicate ever passed upon by the Courts of this country, in which the Courts were called on to pass upon similar questions involving the acts of President Lincoln.

Therefore, while yielding to no one in my deference and respect for the Presidential office, and in my appreciation of the absolute importance of maintaining every possible safeguard around Executive discretion, I conceive that it is not only the power, but the duty of the Government, and the Courts, in adjudicating the rights of the Government, to consider these questions, when properly presented, with proper regard to the proprieties of the situation, what Mr. Justice Holmes once called "equitable propriety." When so presented, the Court should receive and consider the facts upon which the administrative discretion of a limited agency, even by the high office of the President himself, should be controlled, or upon which that discretion was exercised.

That is our view, I recognize, as your Honor has said, that this matter should be handled with the greatest possible delicacy, and I have tried to so handle it.

THE COURT: I have no fault to find with the position that you take. Whether it is sound as to this particular transaction is for me to deter-

mine primarily. But I am wondering this, Colonel Anderson: If your position be sound, the position taken in your last statement, whether Mr. Kresel has overstepped or even approached the limit of cross-examination that he would be entitled to in searching the knowledge of a Congressional representative through the Order of the President, and whether he would not be entitled to examine him as to each statement and each sentence embodied in Mr. Palmer's order—"Did you know this?" and the witness would probably answer, "It was so stated in the order." He could stop there or he could say he had further knowledge of that fact. I will get you to help me on that, if you will. Assuming for a moment that this is cross-examination proper and not examination in chief, I do not see just where the line stops.

Mr. Anderson: If your Honor please, my objection, if your Honor will recall, was that the counsel was arguing with the witness as to the interpretation of the orders and papers which were presented to him. I did not object, although I think it would be valid to object. Under the circumstances stated to the Court, this witness is really not subject to cross-examination, but each party must examine him under the rules controlling on the direct. But I did not object to that, because I did not mind it.

However, I think that he has gone as far as he ought to go in view of the peculiar circumstances under which this witness is put on the stand.

The Court: But I am wondering whether you are aiding me in the general consideration of the case. You recall that Mr. Kresel said he would not go further on that line, but he had some general questions he wanted to ask.

MR. ANDERSON: All right. I am perfectly willing.

MR. KRESEL: Does your Honor desire to hear me further as to our position on the general and underlying basic question of law, or shall we go on?

THE COURT: I think not, Mr. Kresel, because you stated it most admirably and so did Mr. Guthrie; and you have called attention to it two or three times in the progress of the case.

MR. KRESEL: May I make this one observation, however, that it is our contention, that if your Honor is to determine whether the discretion given to the President by Congress was properly exercised, we are entitled to show all the grounds that moved the President and his representative in coming to the conclusion, not only such information as Mr Polk had that was conveyed to him by Mr. Palmer, or that was contained in that report, or that was contained in Mr. Palmer's letters, but all information that Mr. Polk had bearing upon the question which induced the action taken by him. And may I recall to your Honor and to Colonel Anderson the fact that upon his direct examination Mr. Polk was careful to say that he had other information in his other official capacity. I have sent for the stenographic record of his direct testimony, because I want to read that to your Honor.

MR. ANDERSON: I am perfectly willing to concede it; that Mr. Polk did say that he had other information.

MR. KRESEL: Then does not your Honor see that upon the very direct examination of this witness he states substantially that his action was induced not only by what he learned from Mr. Palmer, the report and the letter, but by other information that he had in his official capacity?

As I said to your Honor, I shall not insist upon Mr. Polk's stating here anything which in his judgment ought not to be stated because of reasons of State. But I do want to ask him, as I say, with your Honor's permission, the various official capacities in which he acted and the sources of information that were available to him upon this very subject.

THE COURT: You may proceed along those lines.

By MR. KRESEL:

XQ. 93. Before I come to that, Mr. Polk, after you signed this Order of the 26th of February, 1919, did you have any talk with the President of the United States about it?

A. No extended talk. My recollection is that I told him as a matter of news that I had signed the Order. But we did not discuss it at all. That was some time between that date and the date he sailed. He sailed, I think, the 5th of March to go back to France.

XQ. 94. So that between the 26th of February and the 6th of March, 1919, you did state to the President of the United States that you had signed this particular Order of February 26, 1919?

A. I think I told him we had signed two orders, as I recall it. I merely stated it to him as a piece of information, that I had assumed to act, although he was there, in the country.

XQ. 95. And was that the reason that moved you to mention the matter to the President?

A. Of course.

XQ. 96. Namely, that you signed this Order although the President was in this country?

A. Although he was in this country.

XQ. 97. As counsellor of the State Department, which was your official position during this time, were

you in close touch with the Secret Service and Intelligence Department of the Government?

A. Yes.

XQ. 98. Will you please tell the Court, if it is a fact, how the Intelligence Department of the Governmental Departments centered in the State Department of which you were counsellor?

MR. ANDERSON: Your Honor, please, I object to that.

MR. KRESEL: Pardon me. Let me finish the question.

XQ. 98. (Continuing) I do not mean to ask you to give any information, you understand. I simply would like to have the Court understand the arrangement—how it was that the Intelligence Department, if it did, centered in the State Department?

MR. ANDERSON: If your Honor please, I must object, not only because it is utterly immaterial here how it centered in the State Department—the witness has said he was in touch with it—but I do not think it is at all proper to go into the question of the relations of the Secret Service and Intelligence Department with the various departments of the Government. It is not called for by this examination. It cannot have any relation to this matter, what the witness may have known, if pertinent. I am not objecting to it at this time, but I do object to going into that question of the relations of the Secret Service and Intelligence Department of the Government with the State Department.

MR. KRESEL: Your Honor will understand that I am not asking him to tell me a single word as to what he learned.

MR. ANDERSON: Even the connection is important.

THE COURT: It seems to me, Colonel Anderson,

I am going to sustain your objection, but will you help me on this? Going back to your previous statements, I am wondering whether, in the delegation of power by Congress or the conference of power by Congress upon the President, there is not a different condition existing than if it conferred that power on an individual, for instance, the Alien Property Custodian, and whether we should not be more restricted in our inquiring into the exercise of discretion or the reasons moving the exercise of discretion, when that power has been given by Congress to the President, than if given to some other person.

It seems to me that that is one of the incidental difficulties involved in the major issue which was just discussed. Now, then, with respect to this question, it seems to me that if you stop with an answer, if the answer were available, then you have only raised a query in my mind as to whether he did not get some information from that source; and that query, without its being given an affirmative background by the disclosure of the facts, would disturb rather than aid. If you should raise that suspicion or that belief, that probability, then the other side would surely be entitled to inquire as to what you got, except where reasons of State would prevent.

MR. KRESEL: My position, your Honor, if I may interrupt you, is that I have a right to have this witness state what information he did have from that source. But, as I said, I shall not insist upon getting that. I concede to the Government the right to inquire of this witness, if it so desires, as to what information he had from that source. But all I am now seeking to show are the sources of information that this witness had.

THE COURT: He has told you, Mr. Kresel.

MR. KRESEL: All he said is that he had other sources of information.

THE COURT: No, as I recall, he did state that his position was such that he had this Intelligence Department as a source of information.

MR. ANDERSON: And that he had known something of German activities before the war, as counsellor of the State Department.

THE COURT: Your immediate question is the connection or the details of the connection between the Intelligence Department of the Government of the United States and the position which Mr. Polk held at that time.

MR. KRESEL: I am not asking for the details, your Honor. My question was simply whether it is a fact that during the time that Mr. Polk was counsellor to the State Department, the Intelligence Departments of the Government centered in the State Department.

MR. ANDERSON: That would be most improper.

MR. KRESEL: Why is that improper?

MR. ANDERSON: For the reason that the relations between the various departments of the Government, especially the Secret Service and Intelligence, are matters that nobody is allowed to know about.

MR. KRESEL: But I am not asking what the Secret Service said or did.

THE COURT: Let us go back to the question. Will you please repeat the question? (Q. 98 repeated as recorded above.)

I sustain the objection.

MR. KRESEL: May I have it appear upon the record, if your Honor please, that we claim the right to elicit from this witness every bit of information that he had before him when he signed this Order, from whatever sources he derived it,

saving only such information as upon the witness's statement it is contrary to public policy and to the welfare of the country to reveal, which the Court may rule he should not state.

I state to your Honor that we claim that right because the Government has brought us into this Court and has directly challenged the act of Mr. Polk and of the President, for whom he acted in a matter where discretion had been vested in the President by Congress.

We say that, the Government having taken that position, it cannot now close the door and on one side attack the validity of this Order, say that it is founded upon a misrepresentation of fact and upon suppression of facts, and stop us from showing what information the witness had upon which he acted.

Of course, we bow to your Honor's ruling. If your Honor says we cannot inquire into that, we are stopped. But I want it clearly to appear upon the record what our position is in the matter.

MR. ANDERSON: I will ask your Honor's indulgence for a moment that you can get our position clear. The Government charges in Paragraph 34 of the Bill:

> "that necessary and essential facts with regard to the seizure and proposed and pretended sale and disposition of said patents and other rights mentioned in said orders at private sale were not stated or disclosed to said Frank L. Polk, but were withheld from him and suppressed; that other facts in connection therewith, and especially the attitude of the Federal Trade Commission, charged with issuing licenses under the enemy-owned patents and other rights aforesaid, with respect thereto, were misstated and misrepresented to said Frank L. Polk;"

MR. KRESEL: Will you read the next sentence?
MR. ANDERSON (continuing): "that his signature to said order and the issuance thereof by him were procured as aforesaid through such suppression and misrepresentation of the facts, which, if the same had been known by said Frank L. Polk, would have prevented his signing and issuing said orders."

The Government's contention is that the sole inquiry under that allegation and in relation to that allegation is whether or not the facts were disclosed to Mr. Polk.

THE COURT: What facts?

MR. ANDERSON: The material facts relating to the signing of this order, upon which he predicated his action in signing this order. The charge is that the facts were not disclosed to him.

THE COURT: Do you care to be still more specific, Colonel Anderson?

MR. ANDERSON: Yes, sir. You mean as to what material facts?

THE COURT: Yes.

MR. ANDERSON: Then I would say that any fact which it was the duty of those asking the order to disclose and actively state, which was not disclosed or not actively stated, would come within that limitation. But as to what Mr. Polk may have known or what any one else may have known who exercised this function at that time, there is not a suggestion here as to what he knew or did not know.

The complaint is not of Mr. Polk, but of those who asked the order of him; and the sole inquiry is what they did and what they disclosed. If they disclosed all the facts that they were called upon to disclose, or if they disclosed facts that they purported to disclose, accurately, then the

question as to what Mr. Polk knew in addition would not be subject to inquiry.

Have I made myself clear on that subject? I hope I have.

THE COURT: Yes, but it seems to me there is that difficulty, Mr. Anderson. I can see from your standpoint that possibly any evidence which would tend to show that The Chemical Foundation was endeavoring, or those who were its common stockholders, for selfish or financial reasons, to secure a sale of these patents, a private sale to The Chemical Foundation, and that the stockholders were not induced solely by patriotism, would be a fact which might be the determining fact from your standpoint as to whether Mr. Polk should or should not have signed that order.

I can likewise see the standpoint of Mr. Kresel. If I understand his contention correctly, it is that that would necessarily be an incident, that is, the possible commercial profit to any persons who were engaged in the chemical or dye industry in this country, and that going through years of building up such an industry would be a condition or a fact that would necessarily be presupposed by any individual familiar with the business, and particularly a person of the experience of a President or of any person connected with the State Department, and that the person authorizing such sale might consider that such interest would be a necessary incident of such sale, and that if the persons so purchasing patents engaged in practices in violation of the Sherman or Clayton Act, that those improper practices could be dealt with by the Government subsequently; and that for reasons which were known to the Department of State and to the President, the order might have been signed wholly with-

out regard to such purpose on the part of the chemical and dye industry to eventually profit by the taking over of those patents.

MR. ANDERSON: Your Honor will recall that the Statute provides that the order must state the reasons therefor in the public interest; and my view is that in view of the terms of that Statute, the only reasons that can be considered are those stated in the order.

MR. KRESEL: Yes, but the reasons which actuated the President or Mr. Polk in assigning those reasons in the order are just as effectual and just as important as the reasons which are stated as the basis of them.

THE COURT: If I recall, Colonel Anderson, you stated that you could challenge and question the reasons.

MR. ANDERSON: As stated in the order, whether those reasons were sound and whether they completely stated the facts, that is, whether the facts upon which they were predicated were completely stated. I can question that. But I take it here that no reason can be taken to justify this sale by a private sale except the reasons stated in the order, and that we can only inquire into the facts that underlie those reasons.

MR. KRESEL: Let me give an illustration, your Honor.

THE COURT: Pardon me, Mr. Kresel.

MR. ANDERSON: The President must state the reasons. Otherwise the order is not valid.

THE COURT: Then your contention is that you may inquire into the accuracy of the facts stated in those reasons.

MR. ANDERSON: Yes, the accuracy of the facts.

THE COURT: You may take issue not only by

way of demurrer to the reasons, but by a denial or traverse upon the accuracy of the facts.

MR. ANDERSON: In other words, I take it, where we show the order was prepared by some one else and sent to the President as stating the reasons, in the public interest, or through Mr. Polk, that we can inquire as to whether those reasons were accurately or correctly stated, but we cannot inquire into what knowledge Mr. Polk may have had, which were not stated in the order, in the public interest. Because, if that were true, the provision in the Act requiring the President to state his reasons would be an absolute nullity.

MR. KRESEL: Your Honor will grant me a few minutes. I think I can by one illustration show the fallacy of the argument on the other side. Take the first reason that is assigned in this order by Mr. Polk, namely, that the Letters Patent, trademarks and similar rights cannot be sold to the best advantage at public sale.

Let me assume an extreme case. Let me assume that Mr. Polk in his official position had knowledge that the German Government had made an arrangement with some particular person to go and bid these patents in at a public sale. Just let us assume that for the purpose of the argument.

Is it contended by the Government that Mr. Polk and the President, if your Honor is to inquire as to their reasons, are to be estopped from telling your Honor what they had in mind as a basis for making that statement? Is it possible that they can attack the transaction and yet stop us from showing the justification of it? I do not understand Colonel Anderson's reasoning in this matter. He is always very clear in his reasoning. But I must confess I do not understand this.

They cannot attack the transaction and yet stop us from showing the justice of it and the fairness.

THE COURT: Mr. Smart, will you turn back to the last question, please.

(XQ. 98 repeated as recorded above.)

THE COURT: Has counsel any objection to my inquiring, as I am taking up again the question that I overruled, from Mr. Polk as to whether the facts called for by your question are facts that are well known or are known only to the department?

MR. KRESEL: Your Honor recalls the question. It was as to whether the Intelligence Department centered in the State Department. I see no objection to your Honor making the inquiry.

MR. ANDERSON: We have no objection to your Honor making any inquiry.

By THE COURT:

Q. 99. The question I would like to ask is whether the facts called for by that question of Mr. Kresel are facts that are known generally to the public and are generally available to the public, or does the question call for facts which are known or should be known only to the Executive Departments?

A. The particular question would call for a reply that is known to the public.

THE COURT: Then inasmuch as the objection was sustained, mainly for reasons of State and not otherwise, I shall withdraw my ruling sustaining the objection and allow the general rule of practice that we have adopted in this case to apply to that question as well.

MR. ANDERSON: Will your Honor permit me to put my objection in a little more specific form?

THE COURT: I thought you had.

MR. ANDERSON: I want to make the objection

to the question specifically. I want to object to this question and any answer thereto, and at the same time move to strike out all the examination thus far that relates to matters which are not the basis of the facts stated in the executive order.

I wish to object to this question specifically on the ground, in addition to being immaterial and irrelevant, that it makes inquiry as to matters relating to the Government which are not involved in this case and which, with deference, we think, should not be inquired about.

Second, that under the Statute under which this order was entered or purported to be entered, the executive officer or person exercising the power was required to state his reasons for his action, and it is not pertinent to inquire into matters that are not covered by the reasons given in the executive order.

THE COURT: I think this inquiry comes specifically under the first reason assigned, as illustrated by Mr. Kresel's last statement.

If you recall the question, Mr. Polk, will you answer it; and if an inquiry is made from you, either by Mr. Kresel or Colonel Anderson, which calls for disclosures that should not be made public for reasons of State, will you indicate by saying so.

By MR. KRESEL:

XQ. 100. Mr. Polk, I am going to ask you some questions. I will not ask you what the information was that you had, and, with Colonel Anderson's permission, in order to avoid eliciting any such facts, I am going to make my questions leading. Of course, if the Colonel objects to it, I shall try to mend my way.

MR. ANDERSON: I have not objected on that ground yet.

MR. KRESEL: You did on one occasion.

XQ. 101. As counsellor of the State Department, did you have charge of arranging with the British and French authorities for permission to allow German drugs to be passed through the blockade?

A. Drugs and dyes, yes.

MR. ANDERSON: Your Honor understands that this is all subject to objection.

THE COURT: I understand that that all is, and I gave you permission to take the answer to the preceding question, Mr. Kresel?

MR. KRESEL: Pardon me.

THE COURT: I overruled the objection to your preceding question. You may take the answer to that, if you want to.

MR. KRESEL: I understood it had been answered.

THE WITNESS: No, it had not.

MR. KRESEL: I beg your pardon. Will you now answer it, please?

THE WITNESS: What was the question?

XQ. 102. The question was whether it was a fact that the Intelligence Department of the Government centered in the State Department?

A. Not exactly.

XQ. 103. Will you state what was the fact?

A. Prior to our entering the war, in the fall of 1915, all the secret service agencies sent their information into my office. That office was made a clearing house for secret service information.

XQ. 104. That is all I desire to establish.

A. The reason I answer that question is, that was published in the papers at the time.

XQ. 105. Now, to return to my other question, that I was inquiring.

A. But, as I say, that ceased in April or May, 1917, after we got into the war. We still had information, but it was not a clearing house.

XQ. 106. Now, do you recall what drugs were imported from Germany pursuant to this arrangement that you made with the British and French Embassies?

A. The arrangement was not made with the British and French. The arrangement was made with the British.

XQ. 107. With the British.

A. In regard to the drugs, and that was for the importation of particularly salvarsan and novocaine.

XQ. 108. Prior to your acting in such a way as resulted in getting the British to agree to this, had you received any information as to the necessities of the country for such drugs?

A. Yes.

XQ. 109. Had you been in consultation with officers who represented to you, in your official capacity, the necessities of the country for those drugs?

A. We received from the drug houses and from the heads of institutions statements that there was a crying need for those particular drugs.

XQ. 110. Had you received any information as to the effects of substitute drugs?

A. I recall that some of these people stated that the so-called substitutes that were either manufactured or imported from elsewhere into this country, were in some instances ineffective; in other instances, dangerous.

XQ. 111. Now, as to dyes. Did you have information in your official capacity that with the outbreak of the European war the importation of German dyes ceased?

A. Very much curtailed and at one time it was prohibited by an embargo in Germany.

XQ. 112. Was information brought to you in your

official capacity of the requirements of the country for such dyes?

A. Yes, I discussed the question with the Secretary of Commerce.

XQ. 113. Mr. Redfield?

A. Mr. Redfield.

XQ. 114. I am not inquiring what your discussion was, but I am inquiring of you as to whether you knew, had gained information before you made this order, of the importance of the dye industry and of the dependence that this country had on Germany for dyes?

A. Yes.

XQ. 115. You knew that to be a fact?

A. I knew that to be a fact.

XQ. 116. Do you remember any particular institution that made representations to you in your official capacity as to the importance of the dye industry in the country from a point of view of munition supplies and dyes?

MR. ANDERSON: I will have to object, if your Honor please, if we are going into representations and hearsay. I do not know where we will stop.

MR. KRESEL: I frankly admit, your Honor, that this testimony might be hearsay, but I claim that we have a right to show it as information in the possession of this official as a basis of his action.

THE COURT: Will you turn to the third reason assigned by Mr. Polk: "The public interest will be best served by a wide use of the inventions covered by said letters patent and similar rights and such wide use can be most readily promoted by the licenses which the said The Chemical Foundation, Inc., is by its charter obligated to grant."

MR. KRESEL: Yes, sir, that is certainly pertinent to that, isn't it—to show that he in his official capacity knew of the importance of a chemi-

cal industry to a country, because it was the source of the supply of munitions in time of war and of dyes and drugs in time of peace.

THE COURT: It is not sufficiently clear, your objection, to apply the general rule to that question that was applied to the other.

MR. ANDERSON: Does your Honor wish me to make the objection clearer, or is that for the status of the record?

THE COURT: No, I do not mean the objection is not sufficiently specific. You may have the answer.

MR. KRESEL: May I have the question read?

MR. ANDERSON: I note an exception.

THE COURT: Yes, the exceptions, Colonel Anderson, will be implied in all cases.

MR. ANDERSON: Yes. Thank you.

(XQ. 116 read as recorded above.)

A. Individuals pointed out the close relation between dyes and chemicals in the production of munitions and pointed out our dependence on the Germans for certain processes and patents.

XQ. 117. Was it pointed out to you by representatives of our industries that if the Germans had these patents that were here involved they could after the war destroy any chemical industry that might be built up during the war?

A. That was pointed out.

XQ. 118. Without asking you to state what your conversation with Secretary Redfield was, will you state whether it was in connection with building up a dye industry in this country?

A. It was.

XQ. 119. Was the question of building up a dye industry in this country discussed with the President?

A. Yes.

MR. ANDERSON: Well, did he discuss it, or who discussed it?

MR. KRESEL: I am coming to that.

XQ. 120. Was it discussed at Cabinet meetings?

A. Not at any of the Cabinet meetings at which I was present.

MR. ANDERSON: If your Honor please, I do not think we have a right to go into Cabinet meetings here. If we are going into Cabinet meetings, I am going into them, too, at a later time. I will have to.

MR. KRESEL: That is right.

MR. ANDERSON: I would not do it, but if we are going into Cabinet meetings here we might get very far afield.

THE WITNESS: I would not feel at liberty to answer any question bearing on the discussion at Cabinet meetings anyway, Colonel.

MR. ANDERSON: If you say it was discussed at Cabinet meetings—

THE WITNESS: No, I say not when I was present. I do not know whether it was discussed or not.

MR. ANDERSON: Oh, I thought you said it was discussed.

THE WITNESS: No, I hope the answer was not that way.

THE COURT: I am not going to hear any discussion now; I am going to let you put another question and then we will hear any discussion upon that.

THE WITNESS: I would not answer such a question.

XQ. 121. I will ask you this question—whether as the result of the representations that were made to you in your official capacity, the discussions with Secretary Redfield, the conviction that the country was

dependent upon Germany for these essential dyes and drugs and munitions—whether the Government formed any policy as to building up a dye industry in this country. Just say yes or no to that.

MR. ANDERSON: One moment. I first would like to ask what was the answer to the preceding question, if I may ask, sir, on the discussion at Cabinet meetings.

MR. KRESEL: He said he was not present.

(The reporter read as follows: "THE WITNESS: No, I say not when I was present. I do not know whether it was discussed or not.")

MR. ANDERSON: I wish to object to the particular question that was asked, first because it is undertaking to draw a conclusion of the witness.

THE COURT: This is the last question, Colonel?

MR. ANDERSON: The last question.

THE COURT: Which was what?

(XQ. 121 read by the stenographer as above recorded.)

MR. ANDERSON: Now I would object to that on the ground that it is asking generally to state as a result of representations made to the witness, without specifying who, where, when, whether it was ten years ago or one year ago; second, it undertakes to predicate his answer upon a conviction—of whom? The country? The witness? Whose conviction? Therefore, it would be a legal error. Third, that the policy of the United States with respect to business is fixed by Congress and not by the witness, however distinguished may have been his position or his qualifications, and therefore I do not think that any witness could be asked as to what policy was formulated unless that policy was put into the form of law, an order by

an authorized administration, and then it would have to be produced.

MR. KRESEL: May I say that I will show the law—I will follow it up with the law.

MR. ANDERSON: Then the law speaks for itself.

THE COURT: Colonel Anderson, your contention is that the Trading with the Enemy Act did not confer the power?

MR. ANDERSON: That is the question.

THE COURT: Your contention is that the Trading with the Enemy Act did not confer the power for the Executive Department to decide upon a policy.

MR. ANDERSON: Certainly.

THE COURT: Yes, that is your contention.

MR. ANDERSON: Yes, certainly.

THE COURT: But Mr. Kresel's contention is the opposite, that there was a conference of power which was broad enough to enable them to do this very thing, and now he is inquiring as to the reasons why they did it. Unless I determine *in limine* whether your contention of the law is right or whether Mr. Kresel's contention of the law is right, then I have got to take evidence that may be considered under each of those contentions, have I not?

MR. ANDERSON: Yes. If your Honor will permit me—I regret to take the time but, if your Honor will permit me, the law speaks for itself as to what it means and the witness can not testify as to that.

THE COURT: Surely.

MR. ANDERSON: That is first. Second, the policy of Government must be drawn from that law, because Congress alone can fix a policy with respect to industry.

THE COURT: Are you not overlooking this assumption? You have gotten in your mind probably, that this act does not confer the power, that you are overlooking the undecided question as to whether the power is there, and there is a latitude of discretion for the Executive Department, in which the Executive Department could move.

Now then, Mr. Kresel's question assumes the existence of power, and what the Executive Department decided to do in the proper exercise of that power, as it saw.

MR. ANDERSON: If your Honor will permit me, my third point leads up to just what your Honor suggested, and that is, if we are going to concede that the Executive Department fixes a policy, if the witness can fix the policy, he can state what the policy was. He can state the facts.

MR. KRESEL: That is what he was asked for.

MR. ANDERSON: But he was asked for the policy, the policy that had been fixed, as a conclusion, I presume, by the entire Executive Department. Certainly I would not say that one witness could get on the stand, however distinguished that witness was, and undertake to say what the fixed policy of the Government was, unless it brought in something that represented the action of the Executive Department of the Government.

THE COURT: The order of the President giving Mr. Polk the power to authorize a proper sale under the Trading with the Enemy Act, enables him to say, and he is the one person who would be authorized to say, as to whether the Government had the policy. I will overrule the objection, and you may take an exception.

MR. ANDERSON: Exception.

XQ. 122. I was asking you, Mr. Polk, whether it

was the policy of the Government at this time, in view of the information that the Government was in possession of, as to the dependence of the country upon Germany for a supply of these essential dyes and munitions and drugs, to build up a chemical industry in this country?

MR. ANDERSON: My objection is noted, and exception?

THE COURT: Yes.

A. You mean the policy of the Executive Department?

XQ. 123. Yes, of course.

A. Yes.

XQ. 124. Now, do you remember?

A. Wait, pardon me. Mr. Kresel—when do you mean?

XQ. 125. I mean at the time.

A. Before we were in the war?

XQ. 126. Before we were in the war, certainly. When we were threatened with it.

A. I do not know that I can answer that question. I mean, when you say the whole—there were some members of the Executive Department who felt and were permitted to urge legislation, and legislation was enacted, but that was——

XQ. 127. That is the extent to which you want to testify as to the policy?

A. Yes.

XQ. 128. Very well. I will take that. Now, the legislation you talk of is what?

A. It was a Bill introduced by the late Representative Hill, Ebenezer Hill, of Connecticut, Republican member from Connecticut.

XQ. 129. Now I do not want to go into the details of that legislation, except to ask you whether it is a fact that pursuant to this policy that you have stated, the administration was in favor and urged, although

it was a Democratic administration, high tariff upon importations of dyes?

MR. ANDERSON: I think the record will speak. It is urged. The only possible way to be urged was either by a message by the President or by a report of a committee or by legislative act.

THE COURT: There is record evidence of that which has been put in evidence, or which you have called attention to, I think, a message from Ferry to President Wilson. There is no better evidence on that point than is there.

MR. KRESEL: By the President?

MR. ANDERSON: By President Wilson. There is no better evidence on that point than is there.

That message was May, 1919, and the Bill to which Mr. Polk refers was before we went into the war, so I do not think that message could have any relation to it, but I do respectfully insist that if there is any such urgency upon Congress or any other body, the only person that can co-operate with Congress is the President, and that is the only way the Executive power can speak.

THE COURT: I think the objection is well taken. I will hear you, if you wish.

MR. KRESEL: No, your Honor. If your Honor is convinced of that, I shall not pursue it.

XQ. 130. Did you personally, in your official capacity, urge the passing of this Hill Bill?

MR. ANDERSON: I object to that.

MR. KRESEL: Have I not a right to show that?

MR. ANDERSON: This is a court of law, and it does not speak for the administration.

THE COURT: This is not the Trading with the Enemy Act?

MR. KRESEL: No, it is not the Trading with the Enemy Act.

MR. ANDERSON: It is before we ever went into the war.

THE COURT: I do not see at all that we are concerned with the policy of any administration with respect to dyes and chemicals before we went into the war. It seems to me if we are concerned with a policy, it is with the policy for a limited period of time immediately prior to February 26, 1919, the date on which Mr. Polk signed this order.

MR. KRESEL: No, your Honor. You will pardon me if I will argue it with you. The point that we make is that when Mr. Polk signed this order, in February, 1919, he had information and he could divorce himself from it as to the dependence of this country upon Germany for a supply of essential chemicals and dyes. Information that he had obtained in an official capacity, information that came to him quite apart from Mr. Palmer's talk with him, or Mr. Palmer's report or Mr. Palmer's letter. That is what I am trying to show, and it seems to me, with all due deference to your Honor's opinion, that it makes no difference when he obtained that information —whether it was before the enactment of the Trading with the Enemy Act or subsequent thereto, as long as it was prior to his making this order.

THE COURT: And you show continuity, of course.

MR. KRESEL: Yes, of course.

THE COURT: I assume you are approaching it from a different aspect than I did. I was approaching it from the date of the order on going back, and you are going forward.

MR. KRESEL: I do not want to take any more time with that than necessary. May the witness

answer the last question, or does your Honor——

THE COURT: No, I think the objection is well taken, Mr. Kresel. You may take his answer under Rule 46, if you wish.

MR. KRESEL: No. That is enough.

XQ. 131. Mr. Polk, it is charged in this Bill of Complaint that certain corporations who are named in the Bill, engaged in the chemical industry in this country, and certain other concerns not named, likewise engaged in the chemical industry in this country, and certain trade associations entered into a conspiracy to establish and maintain a monopoly of the dye industry of the country, and that pursuant to that conspiracy, and in order to enable them to perpetuate their monopoly, they conspired to induce the Alien Property Custodian to make this sale of the patents here involved to the Chemical Foundation. Now, I am going to ask you whether, assuming that you had known as a fact that there was a monopoly here such as I have described, as is alleged in the Bill of Complaint, whether you would nevertheless have authorized the sale of these patents?

A. That is surely a hypothetical question.

XQ. 132. Of course, but I have to put it in that way.

A. Well, I would assume that the Clayton law, and the Sherman law would have protected the country from a monopoly; and in view of the statement that these patents were to be sold to all who might require them——

XQ. 133. Licenses, you mean?

A. Licenses. I would have signed it.

THE COURT: Might I ask why?

MR. KRESEL: Yes, sir.

XQ. 134. The Court is asking why?

A. Why I would have signed the order?

THE COURT: Yes.

A. (continuing): Because I felt, your Honor, here was an opportunity to build up a real chemical industry in this country; something we never had before. As I stated, we were completely at the mercy of Germany. These patents were, many of them, not being used in this country, were being held, for instance Swiss and French patents, being brought in. I say that was the effect; whether they were held for that purpose I do not know, but that was the effect; and for that reason it appealed to me that this was a wise plan, to make the American people independent of foreign controlled patents.

XQ. 135. I assume that the consideration that munitions of war were so closely related to the dye industry and covered by some of the patents, had some influence with you?

A. At that moment, that was not so pressing as the other causes, because we were negotiating peace. That is also a consideration for the order.

XQ. 136. Now, Mr. Polk, it is also alleged in the Bill that—I think I had better read the Bill so as not to mis-state it. It is stated in the Bill (I am reading from paragraph 34):

> "that other facts in connection therewith, and especially the attitude of the Federal Trade Commission, charged with issuing licenses under the enemy-owned patents and other rights aforesaid, with respect thereto, were misstated and misrepresented to said Frank L. Polk."

Now, I am not now asking you whether any such facts were misrepresented or misstated to you. My question at this time is whether you knew that by the same order, Executive order of December 3, 1918, made by President Wilson, by which he delegated to you the power to be exercised under this amended Section 12 of the Trading with the Enemy Act, he at the same time defined the respective duties and responsi-

bilities with reference to enemy property as between the Federal Trade Commission and the Alien Property Custodian?

A. I knew he had done it. I did not know it was in the same order.

XQ. 137. Yes. You knew, therefore, when you signed this order, that whatever rights and duties of those two respective departments were concerned, were not only fixed by the Trading with the Enemy Act, but were regulated by an Executive order of the President?

A. I knew there was such an order.

XQ. 138. And now I ask you whether any facts with respect to the attitude of the Federal Trade Commission were misstated or misrepresented to you by anybody?

A. I do not recall any discussion.

XQ. 139. Either with Mr. Palmer or with the gentleman who brought you the order?

A. I do not recall any discussion at that time.

XQ. 140. Was your signature to this order of February 26, 1919, and the one of April 5, 1919, and the issuance of those orders procured from you by the suppression or misrepresentation of any facts?

A. Not that I have since ascertained.

MR. ANDERSON: If your Honor please, I object to it, and move to strike that answer out. That is an absolute conclusion. It does not appear whether the witness knew all the facts in this matter; and I ask that the question and answer be stricken out.

MR. KRESEL: But the allegation is a conclusion. They do not tell us what facts were misrepresented, as I pointed out in my opening.

MR. ANDERSON: That is a question of argument to the Court. My point is that this witness can not say that all the facts were stated.

THE COURT: I understand your contention, Colonel Anderson. I will take the answer under the general rule, and as I see it, it should be limited to such facts as he shall have disclosed when he leaves the witness stand, he is now familiar with; and not such facts as are not now brought to his attention or shown elsewhere to have been brought to his attention.

XQ. 141. As far as you know, Mr. Polk, were any necessary and essential facts with regard to the seizure and proposed and pretended sale and disposition of these patents, not stated or disclosed to you but withheld from you and suppressed, as alleged in the Bill?

MR. ANDERSON: I object, for the same reason.

THE COURT: Same ruling.

MR. ANDERSON: Exception.

A. Not that I know of.

XQ. 142. Do you know of any facts which have been called to your attention by the Government upon its examination, or upon my examination, which if you had known at the time you signed these two orders, you would have declined to sign them?

A. No.

XQ. 143. Is it true, as alleged in the Bill, that you signed these orders without knowledge of the facts?

MR. ANDERSON: That is going a little far.

MR. KRESEL: I am reading what is alleged in this Bill.

THE COURT: That is not a physical impossibility, but it is a logical impossibility, for him to answer that; because I do not know that he knows all the facts now. I do not see how it is possible to answer that question; do you?

MR. KRESEL: If your Honor asked me that directly, I should say yes; and I think this witness who has now been examined by both sides, who

has tried to refresh his recollection, who knows about the transaction, can state whether all the essential facts are before him or not.

THE COURT: Well, he has told us what facts were before him. He has answered those last two or three questions, which I will not repeat. I think that must be a conclusion from the general evidence of this witness and all the other evidence in the case.

I do not think that the answer, if he stated it, whatever it might be, would help you. It would not serve me at all. Whether it would serve some other purpose or not, I cannot say.

MR. KRESEL: Of course, your Honor is well aware of the rule that in cases where fraud is charged, or misrepresentation or suppression of facts, as is charged here, that the person so charged or as to whom it is so charged, is usually asked to categorically deny the statements.

I can not supply the facts, because the Government has not alleged them. All I can do is to repeat the language of the Bill.

THE COURT: I do not see how the witness can answer the question. I do not see what good it would do if he did answer it, because it is the facts, and you have a multitude of facts on both sides that have been elicited from this and other witnesses.

MR. KRESEL: Very well, your Honor, I will not pursue that.

XQ. 144. Now, Mr. Polk, the Government has claimed here that the order of the President, delegating the power to you under which you made the orders in question, was invalid because the order is made to you, "Frank L. Polk," and not to you "Frank L. Polk, Counsellor of the State Department"—or Under-Secretary of State, whichever was your desig-

nation. It is therefore necessary for me to inquire of you how this appointment came to you; if you will state?

MR. ANDERSON: If your Honor please, I wish to note an exception now. These are all documents. They speak for themselves. Mr. Polk has exercised the power, signed orders, and everything of that sort; and it is a matter of construction of what those orders mean; and Mr. Polk cannot testify on that subject.

THE COURT: That is as I see it, Mr. Kresel. I do not see how Mr. Polk can help us by stating the facts which led the President to designate him. Now then, you have shown already the office which he then held.

MR. KRESEL: I am going to ask one more question on that.

THE COURT: Yes.

XQ. 145. At this time when the designation was made by the President authorizing you to exercise this power, you were counsellor of the State Department?

A. The official title was "Counsellor for the Department of State."

XQ. 146. "Counsellor for the Department of State"—and is that an office of the United States?

MR. ANDERSON: I object. That is a matter of law absolutely.

THE COURT: The objection is sustained. That involves a construction of the Constitution and of the Statutes, and if counsel can show that, while I would take the witness's opinion ordinarily on it, I do not think it is a matter of testimony.

XQ. 147. Were you an officer of the United States?

MR. ANDERSON: I make the same objection, that it is a conclusion of law.

THE COURT: Objection sustained. You may show what—

MR. KRESEL: I am going to, your Honor.

XQ. 148. Were you nominated for that office by the President of the United States?

MR. ANDERSON: I want to object to that, because I would not want to put him to the trouble of bringing a record. I am willing that the witness testify to it.

MR. KRESEL: What has become of this desire to get all the facts before the Court?

MR. ANDERSON: I object to that.

MR. KRESEL: Maybe you will make me bring the Constitution, so as to prove that.

THE COURT: Are you prepared to concede the fact, or do you want to elicit it from the witness?

MR. ANDERSON: I am perfectly willing to stipulate on the facts that Mr. Polk was nominated to the office as Under-Secretary of State, by the State Department, and was confirmed by the Senate—

THE COURT: Prior—

MR. ANDERSON: Prior to the 3rd day of December, 1918.

THE COURT: Filling that office and exercising his powers and duties at the time of the execution by him of each of these orders of his that has been put in evidence?

MR. ANDERSON: That his occupation—what I mean is, that he continued in that office without resignation until after—what was the date of your final retirement?

THE WITNESS: June 15, 1920.

MR. ANDERSON: Whether he was exercising the functions, I do not know.

THE COURT: I think that covers the facts that you want, Mr. Kresel?

MR. KRESEL: Yes.

MR. ANDERSON: I want to object to these remarks by counsel. I do not want to have personal controversy in this case, but I will not submit, with all due deference to the Court, to any insinuations of that kind by counsel. I want to be understood on that.

THE COURT: There have been very few on either side, Mr. Anderson, and I hope that there will be fewer on both sides.

MR. ANDERSON: I am sure I shall co-operate.

THE COURT: You may proceed, Mr. Kresel.

By MR. KRESEL:

XQ. 149. Now, pursuant to that order of the President, of December 3, 1918, did you sign other Executive orders in addition to the two here involved, those others likewise relating to the disposition of property in the hands of the Alien Property Custodian?

MR. ANDERSON: I object to that on the ground that it is immateral, what orders Mr. Polk signed. The question of the validity of these orders, if they are valid, is a question of law; if they are invalid, he might have signed a thousand and they would not have affected the validity of these in the slightest.

MR. KRESEL: I desire to show, if your Honor please, that this authority by Mr. Polk was exercised during a period of eight months—yes, more than eight months; that he signed under that authority many like and similar orders authorizing private sales and rejection of bids at public sales of property in the hands of the Alien Property Custodian.

I shall follow up that testimony, if allowed in, with evidence that in no case has the Government of the United States challenged the validity

of any such orders, and that in one case the Government of the United States based its title to property involved upon an order so made by Mr. Polk under this designation.

THE COURT: I shall take such testimony this afternoon under our general rule of practice adopted in this case, without expressing any view as to whether it is ultimately to be deemed relevant or material. We will now suspend this case, in order to go over our trial list, and charge the Grand Jury, and I think that will take half an hour. I think probably we had better convene again at 1:15 o'clock, Standard Time.

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AFTER RECESS.

MR. KRESEL: If your Honor please, I now offer in evidence copies of orders made by Mr. Polk under the authority of the Executive order of December 3, 1918, the first one being dated December 4, 1918, and the last one being dated July 8, 1919, said copies being found at pages 90 to 113 inclusive of this book, which is a Government document entitled, "Trading with the Enemy Act and amendments thereto, together with proclamations, Executive orders and orders issued by Frank L. Polk, Acting Secretary of State, under authority of Executive order of December 3, 1918, issued thereunder, to and including November 25, 1919."

I understand that under our stipulation with the Government there is no question as to the authenticity of these instruments. Is that correct, Mr. Galloway?

MR. GALLOWAY: That is right. The book is not covered by the stipulation, but we do not object to it.

THE COURT: Then you offer this documentary

evidence instead of taking the answer to the question that was unanswered?

MR. KRESEL: Exactly, your Honor. I think it will shorten our inquiry.

THE COURT: Admitted.

MR. ANDERSON: May I suggest to counsel if it would be possible—those are very long documents and I do not understand the terms of the order relate to any matter that you want to put in; do they?

MR. KRESEL: Yes, I am very anxious to have before the Court the forms of these orders and the reasons which are assigned in each case by Mr. Polk for the making of the orders, as required by the Statute. Does your Honor see?

THE COURT: As indicating the caution that must be exercised in invalidating the orders here challenged by the Government.

MR. KRESEL: That is one of the reasons, yes, sir.

MR. ANDERSON: If your Honor please, we do not object to the introduction of this evidence upon any question of its authenticity, and admit it, and agree that in any matter of formal proof authenticity is waived. We do object to the evidence as being irrelevant and immaterial to the issues of this case.

MR. KRESEL: As to the length of them, Colonel, as we have already agreed with you on another matter—I do not recall it now—we will endeavor to shorten these as much as possible. I think we can do that.

THE COURT: By agreement.

MR. KRESEL: By agreement of counsel.

THE COURT: That you may not leave out anything that the other side wants. They may be admitted. You have no objection to their being admitted out of order?

MR. ANDERSON: I do not raise any objection on that ground.

THE COURT: They will be admitted, each order having a separate number.

MR. KRESEL: I think that would be better, your Honor.

MR. ANDERSON: If I might say in addition, that I understand that the objection of irrelevancy and immateriality, without repeating it, carries with it the objections generally stated to this character of evidence in our opening statement.

MR. KRESEL: I so understand.

THE COURT: And all evidence which is offered at any time in the cross-examination or in defense by the defendant, is objected to by you save only that of the value of these patents at the time of their assignments; and that all such testimony is admitted over your objection and exception, is conclusively presumed to have been entered.

Received in evidence and marked respectively "Plaintiff's Exhibits Nos. 4, 4-A, 4-B, 4-C, 4-D, 4-E, 4-F, 4-G, 4-H, 4-I, 4-J, 4-K, 4-L, 4-M, 4-N, 4-O, 4-P, and 4-Q." (Same as Plaintiff's Exhibits Nos. 728 to 728-Q, incl. *See Exhibits, Vol. III, pages 1874 to 1924, incl.*)

THE COURT: Are you through with your examination, Mr. Kresel?

MR. KRESEL: Yes, your Honor.

RE-DIRECT EXAMINATION

By MR. ANDERSON:

RDQ. 150. Mr. Polk, I failed to ask you one question this morning that I would like to ask now, and of course leaving it open to cross-examination if it is

necessary or desired, and that is, were you notified of your election as a member of the Board of Directors of The Chemical Foundation about June 22nd, 1922?

A. Was I notified?

RDQ. 151. Yes.

A. June?

RDQ. 152. About June 22nd, 1922, something like that?

A. No.

RDQ. 152-a. You do not recall at all your election to membership on the Board?

A. Colonel, some one mentioned that my name was being considered, but I was never told that I had been elected. I never said that I would accept.

RDQ. 153. You never said that you would accept?

A. No; I mean the decision was never put up to me. Whether there was an election or not I do not know, but I was never told. I do not recall that I was told that there was an election, but I was never asked whether I would serve.

It may have been that they said I had been elected, and for some reason it was never put up to me to say yes or no to it.

RDQ. 154. You never did agree to serve as a member of the Board, did you?

A. No.

RDQ. 155. Mr. Polk, I understood you to say on cross-examination that your action in this matter was taken in order that the industry (meaning the chemical and dye industry) affected by these patents, might be Americanized; did I catch your statement correctly?

A. That was the idea. I did not use quite those words. In other words, we should create—it should be created in this country—chemical and dye industry.

RDQ. 156-7. Your idea then in this matter was that by making this sale in the manner which has been

discussed with you this morning it would be of benefit to the American industry?

A. That was one of the reasons, yes.

RDQ. 158. Do you recall when you first heard of the proposal to sell these German patents affecting the chemical and dye industry to the Chemical Foundation?

A. No, I could not state that positively, Colonel.

RDQ. 159. The letter of Mr. Palmer transmitting this first order to you on the 26th referred to the fact that he had hoped to see you that morning but arrived too late. Can you now locate about the time of your telephone conversation with Mr. Palmer?

A. No, it was some time during the day; it was within two or three hours of the receipt of the letter.

RDQ. 160. Did you not state to Mr. Palmer in that conversation that if he would prepare his order and send it over to you, you would sign it?

A. I do not recall it. My recollection is that the conversation was after the letter was received.

RDQ. 161. After the letter was received?

A. That is my recollection, but I would not be sure.

RDQ. 162. Is it or not true that your first information as to the proposed sale of these patents, trademarks, etc., was really the receipt of that letter?

A. The first official information, yes.

RDQ. 163. Well, did you have any other information on the subject that you recall now independently?

A. Well, I would not want to state that positively, Colonel. I have a recollection that there was some general discussion in which I had taken no part.

RDQ. 164. In which you took no part?

A. In which I took no part at all. I heard it discussed some time about February 26th, somewhere prior to that, but I would not be positive about that.

RDQ. 165. Do you know whom you heard discuss it?

A. No.

RDQ. 166. Just a current, desultory discussion?

A. Yes, I imagine so, something in the Department, either brought up by the trade adviser or some subordinate; I am not sure of that.

RDQ. 167. You do not remember anything that was said at that discussion, do you?

A. No. As a matter of fact, the first definite information I received was that order of the 26th.

RDQ. 168. At the time that you signed that order then, the information which you had on the subject, this particular subject covered by the order, was the information contained in that letter and in the accompanying report, was it not?

A. In the report and the letter and such conversation as I had with the man who brought it over, which was probably very brief, and with Mr. Palmer.

RDQ. 169. Can you state approximately how long was that conversation with Mr. Palmer over the telephone on the subject?

A. Either telephone or in the office, I am not sure which; but I have no definite recollection on that.

RDQ. 170. Mr. Polk, do you remember anything that was said in that conversation with Mr. Palmer in addition to his report? Have you any independent recollection of it?

A. I remember the question I asked.

RDQ. 171. Would you state it?

A. I asked whether this transaction had been approved by the so-called Sales Committee.

RDQ. 172. You were told that it had?

A. Told that it had been.

RDQ. 173. When you speak of this transaction, do you mean the entire transaction, price and everything of that sort?

A. I could not very well separate it in my mind. The impression on my mind was the whole transaction. That is the impression I have now.

RDQ. 174. The whole transaction as embodied in Mr. Palmer's report had been approved by the Sales Committee, was the impression you got?

A. I don't know whether the report was approved by the Committee. I didn't mean that.

RDQ. I did not mean the report. I mean the essentials of the transaction?

A. Yes, that the sale to the Chemical Foundation was approved by the Sales Committee.

RDQ. 176. You stated this morning that you discussed the question of price with Mr. Palmer. Were you advised or did you gain the idea in the discussion that the question of price had been taken up with the Sales Committee?

A. I separated that question. I rather assumed that it had been.

RDQ. 177. You assumed that it had been?

A. Yes.

RDQ. 178. In other words, you assumed and gathered the impression from the facts presented to you at that time, either in the report or in personal conversation or telephone conversation as the case might be, that all of the essential elements of this transaction had been approved by the Sales Committee?

A. That was my impression.

RDQ. 179. In this order you state that the Alien Property Custodian may sell all Letters Patent, trademarks and rights under Letters Patent and Trademarks, including all profits and damages recoverable at law or in equity for past infringements thereof, which the Alien Property Custodian may seize or may have seized under the provisions of said Trading with the Enemy Act and amendments thereto now or hereafter enacted, and which he from time to time shall de-

termine relate to the objects and purposes of The Chemical Foundation, Inc., as expressly defined in its Charter. Did you know at that time or was it stated to you to what extent the seizure of these patents had been carried and how many of them had been seized?

A. How many were actually in hand, do you mean?

RDQ. 180. Yes.

A. No.

RDQ. 181. Did you know or did you have a list of the patents, trade-marks, etc., which had actually been acquired by the Alien Property Custodian?

A. The whole 4500?

RDQ. 182. Well, whatever they were at that time?

A. No, I do not think I did.

RDQ. 183. You did not have any list?

A. No.

RDQ. 184. You did not know at that time what was the name of the trade-marks which were proposed to be seized, since you left that to be determined, their character and relation to the business of the Chemical Foundation, by the Alien Property Custodian; am I right in that?

A. Yes.

RDQ. 185. Something was said to you about the price to be paid. There was no price mentioned in your order you observe that?

A. Yes.

RDQ. 186. Was the question of price really considered in connection with the matter; was it not the question of promoting, if I may use that word, the American industry, by the use of these patents?

A. Well, it was an arbitrary price.

RDQ. 187. Yes?

A. But I do not know that we considered the values of the patents as a whole. In other words,

whether you take what they could have sold them for at auction, because that is what they desired to avoid.

RDQ. 188. As a matter of fact you did not know what the patents and trade-marks were, so you could not consider their value?

A. Well, I had a general idea what they covered. That is, I knew there were certain processes and—

RDQ. 189. Your real object then, in making the sale under the terms prescribed in your order was to promote the development of this industry, dyes and chemical industry, through the use of these patents to the extent they could be used; is that true?

A. That is one of them.

RDQ. 190. As a matter of fact wasn't that the real controlling purpose in the matter?

A. No, I do not think it was the only one. As I recall it it was the policy that had been pursued in connection with these valuable German patents. In other words, turning them over to the Government or semi-Government agencies—not necessarily for the benefit of those industries, but to be used in this country.

RDQ. 191. You said you had not seen the charter of the Chemical Foundation. You regarded it as a semi-Government agency?

A. Yes.

RDQ. 192. And you understood from the report and statements from Mr. Palmer that it was a semi-Government agency, or would be, did you?

A. Well, I read the report. I assumed that it was not a money-making organization.

RDQ. 193. Of course, the thing might not be a money-making institution; for instance, a hospital.

A. Well, of course it was not a semi-Government, because after all there is no such thing as a semi-Government, strictly speaking.

RDQ. 194. Yes.

A. But of course it was created by Government officers with the knowledge of the Executive for a specific purpose. To that extent it was semi-official. Of course, that is a loose expression on my part. I used it.

RDQ. 195. You said it was created by Government officials with the knowledge of the Executive. The President had only returned the day before, had he not?

A. No, but I think the—yes, that is true.

RDQ. 196. And you stated this morning that he was so engaged that he could not consider this matter, which was the reason why you signed this order?

A. Yes, but I did not necessarily mean the President as the Executive, of course.

RDQ. 197. You stated in this order as the first reason that the trade-marks and similar rights can not be sold to the best advantage at public sale after public or other advertisement. Mr. Palmer did not in his letter but did he in his conversation with you state any reason upon which you based that statement?

A. I recall that was one question I usually asked, why it could not be sold at public sale.

RDQ. 198. What was the reason stated, if you recall?

A. As I recall, the reason stated was that these might be bid in by individuals who would hold them, not operate them, and defeat the very purpose that the Alien Property Custodian had in mind, and also fall into the hands of people who would use them purely for speculative purposes.

RDQ. 198-a. Well, was it not stated to you, as indicated in your order—reading it; you are familiar with it—that these patents and their control of importations were vital to American industry? In fact Mr. Palmer in his letter, if you will remember, states

that the ownership of these patents by Americans was vital to American industry.

A. Yes.

RDQ. 199. Was that made clear to you, how they were vital to American industry?

A. Well, I had that experience in 1915 and 1916 when the patents were held here and they were not manufacturing here, but the existence of the patents prevented the bringing in of Swiss and French dyes.

RDQ. 200. The existence of the patents here prohibited the bringing in of Swiss and French dyes?

A. The ownership by the Germans of the patents here, prohibited the Swiss and French dyes being brought in, because they were in infringement of the German patents which were not being operated.

RDQ. 201. To get back to the question, if Mr. Palmer stated that is the reason why he thought they were vital to American industry?

A. I could not recall that.

RDQ. 202. You could not recall?

A. No.

RDQ. 203. In this third paragraph of the reasons, stated in your order, it recites as follows: "The public interest will be best served by a wide use of the inventions covered by said letters patent and similar rights and such wide use can be most readily promoted by the licenses which the said The Chemical Foundation, Inc., is by its charter obligated to grant."

Mr. Polk, as you have stated it, you had never seen the Charter, and I assume you made that statement in the order upon the statement presented by Mr. Palmer?

A. Yes.

RDQ. 204. You personally had no knowledge as to the character of licenses which the Chemical Foundation was authorized or required to grant by its char-

ter except such as was represented to you in Mr. Palmer's report, his statement and letter?

A. Entirely his statement and letter, yes.

RDQ. 205. Did you know at the time that you signed this order or were you advised, as to who were to be the stockholders of the Chemical Foundation, Incorporated?

A. I can not be sure that I was told the names of all the individuals. I was told they were to be large users of the patents.

RDQ. 206. You mean large interests?

A. I meant to say large interests, chemical and dye interests.

RDQ. 207. Would own the stock?

A. Would own the stock.

RDQ. 208. Did you ever talk to any member of the Advisory Committee? You know to what committee I refer?

A. Yes.

RDQ. 209. Before you signed this order on this subject?

A. No.

MR. KRESEL: You mean the Advisory Sales Committee?

MR. ANDERSON: I refer to the Advisory Sales Committee.

THE WITNESS: I so understood it.

RDQ. 210. That is the committee you mentioned this morning as knowing three members of it?

A. Yes.

RDQ. 211. You stated in your answer to a question by Mr. Kresel that you were informed at the time you signed this order that the Chemical Foundation was obligated to give free licenses for the use of these patents, trademarks, etc., to the United States. Was that true?

A. Yes.

RDQ. 212. Was it your understanding or was the information given to you to the effect that the Chemical Foundation would give to the United States free and unrestricted licenses for the use of these patents, non-exclusive, of course?

A. That was my understanding.

RDQ. 213. Can you recall whether that question was specifically discussed between you and Mr. Palmer?

A. There was no discussion on it. I remember up in regard to other patents that had been assigned that statement was made because we had the question to the Army and Navy.

RDQ. 214. That statement was made to you by Mr. Palmer?

A. Yes, that is my recollection.

RDQ. 215. You stated, Mr. Polk, I think that you made the statement to the President, in the few days that he was in Washington, that you had signed this order, or these orders rather?

A. I stated to him merely as a matter of information that I had signed two or three, I have forgotten the number now, of those Alien Property Custodian orders, although he was in the city at the time.

RDQ. 216. You did not state the character of them?

A. I did not go into any detail at all.

RDQ. 217. The President was overwhelmed, I suppose, during the few days he was there, by Congressional duties and you could not discuss things of that kind?

A. No. I did not attempt to discuss them.

RDQ. 218. You stated in your cross-examination that the meaning of your statement in your Executive order, was to the effect that the sale of these properties at private sale was better, that a public sale

would give to individuals the control of the American market through the monopoly which the patents gave and thus create the same situation as there was before, except that the monopoly would be in the hands of American interests. Did I understand you correctly? I have that note there.

A. I think that is substantially correct.

RDQ. 219. And was that condition represented to you by Mr. Palmer as a reason why the private sale should be made?

A. I cannot be sure of that, Colonel, whether we discussed that feature of it or not. I remember that was in my mind.

RDQ. 220. That was in your mind and actuated you attitude. You said something about discussing this matter of the dye industry with former Secretary of Commerce Mr. Redfield. Was that at the time that you signed these orders or at a subsequent time, or about when?

A. That was in 1915 and 1916.

RDQ. 221. That was back in 1915 and '16?

A. I do not recall any discussion with him at that time at all.

RDQ. 222. That was before we went into the war?

A. That was before we went into the war. That was on the general question of importation of dyes and chemicals.

RDQ. 223. As a matter of fact, you do not recall discussing this matter with anyone except with Mr. Palmer and possibly with a representative of the Alien Property Custodian who brought you this order at the time you signed it, do you?

A. Not at the time I signed it, no.

RDQ. 224. Were you told, Mr. Polk, that there was any understanding or arrangement between the

Alien Property Custodian and the Federal Trade Commission and the President with respect to the seizure of enemy owned patents and the disposition thereof or limitations upon the seizure and sale?

A. I knew there had been a discussion on that subject.

RDQ. 225. You did not know what the arrangement was?

A. I can not testify now that I did. Of course, I have seen the order. That may refresh my recollection. I do not think I could testify that I really knew at the time the exact contents of that order.

RDQ. 226. I do not mean the order.

A. I thought you were referring to that order of December.

RDQ. 227. No, I am just speaking of whether you were advised of any arrangement other than that order between the Alien Property Custodian and the Federal Trade Commission or any arrangement or agreement with the President as to the seizure or sale?

A. Not other than the order of December.

RDQ. 228. Other than the contents of the order of December, that was your full information on that subject?

A. As I recall it, yes.

RDQ. 229. I understood you to testify—and in asking this question I would ask the Court to understand that I do not waive my objection to the question—that the policy of building up the dye industry was the great factor in this transaction. Possibly I do not use your exact language. Did I understand you correctly?

A. It was a factor. I do not think I said "the great factor." I think I said "a factor."

RDQ. 230. Is it or is it not a fact that you and Mr. Palmer in your conference considered the effect

upon the dye industry as the one object in view, as indicated in his report that you read?

A. I do not think that was the only object, Colonel. I remember that was an object. Of course, it was a question not only of building up our own industry but it was also putting in use—giving the American people the use of these patents. Of course, you could not do one without the other. Those were two of the factors.

RDQ. 231. Those two were the controlling factors in the situation?

A. Undoubtedly, yes.

THE COURT: May I have the question and answer repeated?

(Question No. 231 and answer repeated).

A. (Continued) Those were two of the factors.

THE COURT: You were both talking at the same time and I wanted to make sure that Mr. Polk understood you.

(Question No. 231 repeated).

A. Those were two of the factors.

RDQ 232. In view of your statement this morning that the policy was to build up the dye industry, and in connection with that you say you signed this order, and in view of the statements in Mr. Palmer's report as to the urgency of that and the vital necessity to the dye industry of these patents, wouldn't you say that that was the controlling factor in the sale of these patents, in the method in which it was made?

A. I do not want to seem to be avoiding your question.

RDQ. 233. I understand. I know you would not.

A. They were two, of course, very important factors in it. Of course, there were other factors but undoubtedly those were the two important factors.

I do not know that they were controlling factors, but they were two very important factors.

RDQ. 234. You stated this morning in your cross-examination that the ownership of these patents might be used to prevent the importation of dyes from England or Switzerland or France and that they had been used by the Germans to prevent the importation of such dyes prior to the war. Did I understand you correctly?

A. So I understood, yes.

RDQ. 235. From your familiarity with the situation, which you indicated in a prior question, can you state whether the use of these patents had prevented the importation of Swiss and English dyes prior to the war?

MR. KRESEL: You do not mean the use of these dyes. You mean the use of these patents.

RDQ. 235. (Continuing) The use of these patents, copyrights, trademarks, or whatever they were?

A. I can cite an instance where I was told that it had prevented. The question came up in regard to certain —

RDQ. 236. If it was hearsay, I think I would rather not go into it.

A. It is not hearsay. It came to the Department in this way. An application was being made to bring in German dyes. There was an embargo and they could not be brought in. The suggestion was then made that they be brought from Switzerland and the statement made that they could not be brought from Switzerland because those Swiss processes would be a violation of certain patents in this country which would not then be operative.

RDQ. 237. You mean German patents?

A. German patents.

RDQ. 238. Do you know whether those patents were included in the list thus sold?

A. That I do not know.

RDQ. 239. Do you recall whether Mr. Palmer stated to you at the time that you were asked to sign this order, in the conference to which you have referred, that the ownership of these patents by private interests would have the effect of controlling the importation of dyes affected thereby?

A. I do not recall he stated that to me, Colonel.

RDQ. 240. Do you recall whether that is stated in his report?

A. No, I am not sure enough to state. If you will let me have the report, I will tell you.

RDQ. 241. No. I just wanted to know whether you remembered it?

A. I do not know that—

RDQ. 242. Were you told, Mr. Polk, that the dye and chemical industry were all interested in the Chemical Foundation, and therefore that there would be no bidders outside of the Chemical Foundation if a public sale were made?

A. I do not know. I do not recall that statement.

MR. ANDERSON: I think that is all as far as I wish to examine the witness.

MR. KRESEL: That is all, Mr. Polk.

THE COURT: Now, Mr. Polk will not be needed further under the subpoena.

MR. KRESEL: No, your Honor.

MR. ANDERSON: As far as we are concerned he can be discharged from the subpoena.

In the event we should want to recall you for anything, I have no doubt you will come back upon request?

THE WITNESS: All right.

(Witness excused).

MR. ANDERSON: I call Mr. Harry S. Brown.

## HARRY S. BROWN.

HARRY S. BROWN, a witness called on behalf of the plaintiff, being duly sworn, testifies as follows:

DIRECT EXAMINATION.

By MR. ANDERSON:

MR. ANDERSON: I would like to state on the record for your Honor's convenience in reading the record, as Mr. Brown's testimony will relate to a matter of the accounts which has not been reached, on account of his personal position, I have agreed to put him on the stand out of the order, with your Honor's permission. That statement is merely to enable you to apply the evidence when you come to the record, sir.

Q. 1. Please state your name, your present place of residence and occupation?

A. Harry S. Brown, New York City; statistician and secretary.

Q. 2. Were you at any time connected with the office of Alien Property Custodian at Washington?

A. Yes, sir.

Q. 3. State in what capacity and for what period, the time that you began and the time that your connection ended?

A. I was an assistant to the Chief of the Division of Accounts from the fall of 1917, shortly after the Custodian's office opened, until February 19. I then became Chief of the Division and was there until May, 1922.

Q. 4. During the period from February, 1919, down to the time you left in 1922, you were Chief of the Division of Accounts?

A. That is right.

Q. 5. In that capacity you had charge of the

books and accounts of the Alien Property Custodian, did you?

A. That is right.

Q. 6. Mr. Brown, it will appear in evidence in this case that about September, 1919, the sales manager of the Alien Property Custodian, Mr. Guffey, remitted to the Washington office certain funds, approximately $250,000, in payment for groups of patents, copyrights, trade-marks, etc., which had been sold by the Alien Property Custodian to the Chemical Foundation. Do you recall that matter?

A. I recall that was some time in the fall, I do not recall the month. I recall that the money came in that fall.

Q. 7. I hand you herewith a photostat of what appears to be a leaf of an individual trust ledger of the Alien Property Custodian at Washington, duly certified by the acting Alien Property Custodian, under the seal of the office, and would ask you whether that appears to be a correct copy of the record on that subject? (Handing witness paper).

A. You merely mean the photostatic sheet? You do not mean this, this is a separate matter.

Q. 8. Yes.

A. Yes, that is undoubtedly.

MR. KRESEL: What is that? I did not get the answer.

MR. ANDERSON: He said Yes, it is, undoubtedly.

THE WITNESS: It is undoubtedly a certified copy.

MR. KRESEL: If it is certified all right.

MR. ANDERSON: I now offer in evidence a photostat certified by the acting Alien Property Custodian under the seal of the office, of Sheet No. 1, Individual Trust Ledger, Alien Property Custodian, Washington, Trust Number 46542, to be

read in evidence as "Plaintiff's Exhibit No. 95."

MR. KRESEL: We object to that, your Honor, upon the ground that it is immaterial and irrelevant; on the further ground that it is a self-serving declaration which is not binding upon the defendant. In other words, our position is that the Chemical Foundation can not be bound by any entries made by the Government in its books.

THE COURT: Do you dispute that, Colonel Anderson?

MR. ANDERSON: When the Chemical Foundation can be bound by the correctness of the entry? The method of keeping the account is a foundation for what I am going to ask the witness as to this fund. I think the evidence is also admissible as a contemporaneous record of what took place on this subject—the official records of the Government as to what took place on this subject.

THE COURT: You mean that this docket entry made by the Government with respect to the disposition of the consideration paid by the Chemical Foundation after the consummation of the transaction, would serve to invalidate the transaction?

MR. ANDERSON: It would have a bearing upon the validity of the transaction when, as I shall show and as the record now discloses, the President of the Chemical Foundation was himself the Alien Property Custodian and directed this extract to be made.

THE COURT: It is admitted under our general rule.

Received in evidence and marked "Plaintiff's Exhibit No. 95." (*See Exhibits, Vol. I, page 283.*)

Q. 9. Mr. Brown, I notice that the entries on the sheet just introduced in evidence—the first three entries are made at the following dates: August 30, 1919,

July 9, 1920, August 28, 1920, and December 10, 1920. Who was the Alien Property Custodian at that time?

A. At the time the check actually came to Washington, Mr. Garvan was actually the Alien Property Custodian, but in July, when Mr. Guffey received the money, I would not want to rely on my memory.

MR. KRESEL: There is no dispute about it.

MR. ANDERSON: That is all a matter of record. I only want to connect it up.

MR. KRESEL: We will concede, beginning with the 4th of March, 1919, and down to, I think, the 10th of March, 1921, Mr. Garvan was the Alien Property Custodian.

MR. ANDERSON: Yes. I only want to connect up his memory on the subject. That is admitted in the evidence and has been proven.

Q. 10. I notice that you have carried here to this Trust No. 46,542, the sum of $249,775. Does that represent the amount remitted as a purchase price on account of these patents, sold by the Alien Property Custodian to the Chemical Foundation up to that date?

MR. KRESEL: Just a minute. We object to that, if your Honor please. The record is now in evidence and must speak for itself. It does not appear that this witness has any personal knowledge of this transaction and is not competent to interpret the record.

MR. ANDERSON: It is not an interpretation, sir. The witness said he was in charge of these books. I will ask him the direct question if the entries were made by him or under his direction.

THE COURT: All right.

Q. 11. That was true, was it not; was that entry made by you or under your direction?

A. The record reads the proceeds of sale of sundry patents was $254,000, against which was $4,925 of expenses, leaving the balance which went into the

Treasury. You were looking at the entry where the amount goes into the treasury, the net amount which was $249,000.

Q. 12. The question was, that record was kept by you or under your direction, was it not?

A. Yes, sir.

MR. ANDERSON: Now, if your Honor please, I am going to prove later the remittance by the manager. For the reasons stated, I have not proved it. To the officers in Washington, the Sales Manager, of this sum as representing the net sales price of the various patents in issue here. Of course, that should have been proved first. I am going to now prove that that entry was made at the direction of Mr. Garvan who was at the same time the President of the Chemical Foundation.

THE COURT: I am afraid I do not understand your purpose, Colonel. Will you tell me, is it merely to show the amount that was paid in fact?

MR. ANDERSON: No, sir. It is to show this, if your Honor please: That the amount of the proceeds for these patents, belonging to thousands of different persons originally, and seized from the thousands of different persons, was never allocated and could not have been allocated, and that they were all sold for a lump sum, and the amount of the proceeds was turned over by the Chemical Foundation in a lump sum, which should have preceded this evidence, but I thought I could get this in this way.

THE COURT: I am not complaining of the order.

MR. ANDERSON: But that it never has been allocated, and frankly, can not be allocated to the several trusts involved, and I think the best evidence of that is the records made under the super-

vision of the Alien Property Custodian, who was President of the Chemical Foundation and made the payment.

THE COURT: Do you object to it for that purpose, other than it is irrelevant and immaterial?

MR. KRESEL: No, your Honor, we are quite content to have the Government undertake to prove what was done by Mr. Garvan as Alien Property Custodian. The position that I took here was that the record speaks for itself, and that the witness should not be—

THE COURT: I understood your position to be that the record will speak for itself, or that this witness would have to qualify himself to explain that.

MR. KRESEL: Yes, sir.

MR. ANDERSON: Certainly.

THE COURT: Has he answered it?

MR. ANDERSON: Yes, that this record has been kept under his direction.

THE COURT: Now, what explanation do you want?

MR. KRESEL: May I add, if your Honor please, That the question as to the right to sell this property for a lump sum comes under our general objection that that is a question, with all due respect to the Court, we claim that the Court can not review.

THE COURT: It is a matter for the determination of the executive department under the authority of the Trading With the Enemy Act, if authority was thereby given.

MR. KRESEL: Yes, sir.

MR. ANDERSON: That is understood, sir.

Q. 13. Now, Mr. Brown, will you state to the Court whether it was the practice of the Alien Property Custodian's Office at the time that Mr. Garvan

was Alien Property Custodian to keep separate individual accounts representing the sales of individual property for individual trust?

A. It was.

Q. 14. It was the practice?

A. Yes, it was.

Q. 15. This item, as I understand you to read from the record, is an entry for sundry patents?

A. Yes, sir.

MR. ANDERSON: I will state that I will prove later what those sundry patents were.

Q. 15. Now I will ask how you came to make this entry, my question being directed to the inquiry as to whether it was done under the direction of Mr. Garvan and his representatives, and you will state the facts to the Court as to how it came about in that connection?

A. In the natural course of events any money that came into the office representing the sale of property was credited to the Trust account for the owner of that property. In this particular case, the property having been sold in a lump, and property of various people having been sold for one lump price, and there being no way to see how much each of these properties was sold for, it was necessary to provide some other way of making this accounting. This final way that was adopted was my own suggestion, and made with Mr. Garvan's approval at the time.

Q. 17. Can you say what discussions you had with Mr. Garvan on the subject and what were his instructions?

A. We had various discussions at one time or another and considered various propositions. We considered dividing the amount of money by the number of patents, but that did not seem fair or practical, and that was abandoned. It was also considered possibly appraising the patents and then apportion-

ing the money in accordance with the appraised values, but that would have been too expensive; so finally, when this suggestion was made partly by me and partly by other people there, Mr. Garvan agreed and said to go ahead and we went ahead and did it.

Q. 18. How did you take care of the individual interests of the various persons from whom these patents and trademarks had been seized?

A. We had established separate accounts for each owner of a patent, and in each one of those accounts we set the patents up, each patent had a nominal value of one dollar. We then made a cross reference against each of those patents for this account, a photostat of which I have here, showing and explaining in that account that the patents had been sold and the proceeds were credited to Trust Account 46,542, and were held there pending the disposal as might be ordered by Congress or otherwise.

Q. 19. You spoke of identifying each individual Trust by cross reference. Did you make any memorandum upon the record to indicate that interest?

A. Why, we—where each patent was entered at a dollar, we took a green stamp and put a star at the top of the account. Many accounts had ten or fifteen or one hundred patents, perhaps, and each patent had a star when it was sold to the Chemical Foundation, and then at the top of the ledger account, the particular account, we had an explanation referring to the star and saying just what the star meant.

Q. 20. Can you refresh your memory from that memorandum and say whether that was the explanation put upon the record?

A. Yes, sir.

Q. 21. If so, read it to the stenographer?

A. This is the explanation: There is a star and "These items starred represent possible equity in patent rights, and so forth, or the proceeds thereof, said

rights having been sold to The Chemical Foundation. See account "A"—and that "A" is changed to "46542."

Q. 22. Then, that reference of the memorandum which you have read, is the reference to the general account which has been introduced in evidence here?

A. Yes.

Q. 23. Exhibit 95. The Alien Property Custodian made sales of other patents than to the Chemical Foundation, did he not?

A. Oh, yes, many more.

Q. 24. In the case of those other patents, were individual accounts kept, individual Trusts set up for each ownership of patents, for each owner?

A. Individual accounts were set up in every case, yes, sir.

Q. 25. When these patents were sold, did you not set up an individual trust account for each owner before the remittance was received?

A. We did not set up a separate account for each owner before, because the records went through so fast that there was not time to do that. In many cases there were disputes as to who was the actual owner of the patent, and we had to have that determined, so that there were probably a pretty good percentage of them that were not actually set up on the books until after the money had come in.

Q. 26. But it was the practice of the office while Mr. Garvan was there to set up an individual trust account for each property sold, at the time of the sale, was it not?

A. For each owner, yes.

Q. 27. Yes, for each owner, and then when the proceeds came in it was credited to that trust?

A. That is right.

Q. 28. And was debited to the Treasury of the

United States, the money being paid into the Treasury?

A. That is right.

Q. 29. In this case the credit was made of the entire proceeds to this general account which has been introduced in evidence, and the charge of the entire fund made to the Treasury of the United States on the other side; is that true?

A. That is true.

THE COURT: Have counsel a copy of the treaty entered into between this Government and Germany that I may use or have?

MR. ANDERSON: Yes, sir. Yes, we have a compilation of all those treaties, including the Treaty of Versailles.

THE COURT: I should be very glad to have a copy of it for use, if I may.

MR. KRESEL: Yes, we will hand a copy to the Court.

(Mr. Hershkopf hands Mr. Anderson copy).

MR. ANDERSON: Of course, at the proper time we will bring to your Honor's attention the provisions of the Treaty of Versailles relating to this matter, because anybody having to read it—

THE COURT: Yes, it has been referred to many times, and I would be very glad to have it so as to refer to it from time to time: I did not mean to interrupt you.

MR. ANDERSON: Here is a copy now, if your Honor please, of both Treaties, which counsel have very kindly furnished me, and later I will undertake to furnish you copies with larger print; because I could not undertake to read that at all, and your Honor may have some difficulty. (Hands Court copy).

Q. 30. I will ask you to look at this photostat of individual account of Abraham Vraustein, Trust No.

36501, and ask if you identify that as one of the individual accounts in which you set up one dollar against each?

A. That is one of those accounts.

MR. ANDERSON: I offer in evidence the individual account, Sheet No. 1, Trust No. 36501, to which I have referred, as a sample of the individual accounts referred to by the witness. There being some five thousand of them, we will just take one.

THE COURT: Admitted under like conditions as the preceding documents.

Received in evidence and marked "Plaintiff's Exhibit No. 96." (*See Exhibits, Vol. I, page 284.*)

Q. 31. Mr. Brown, as an accountant, would you state whether in your opinion it was possible to allocate the aggregate sales price of the patents represented by the accounts introduced to the various individual owners?

MR. KRESEL: We object to that, if your Honor please on the ground in the first place that it is not a subject for expert testimony. Secondly, this witness has not been qualified for this particular purpose. Certainly the Court does not require expert testimony upon that subject.

MR. ANDERSON: I think that is a subject of expert testimony. It is a matter of accounting of the most intricate character. But if the objection is that the witness has not been sufficiently qualified, I will do that.

THE COURT: I am not concerned with that.

MR. KRESEL: Further than that, may I urge, if your Honor please, that it calls for this witness's conclusions, and it also falls under our general objection that it is an attempt to offer evidence for the purpose of having the Court pass upon a discretionary act of the President.

THE COURT: I understand that objection goes to really all the evidence offered by the Government.

MR. ANDERSON: That is agreed.

THE COURT: I do not see that this is the subject of expert testimony. It has been stated time and again that it was an arbitrary price, an aggregate price which was not distributed among the several patents, and consequently if that were true, any distribution among the several interests in these patents, would necessarily be arbitrary. So I do not see how expert testimony would help us. If you want it you may take it under our general rule.

MR. ANDERSON: I think I will take it, and in order that your Honor may understand, I would like to say that the Government some time is going to settle these trusts and one of the elements of a valid sale is the effect upon the possibility of the equitable administration of the trust; and if it is not possible, in the opinion of expert accountants, to allocate this fund to these several interests upon any known principle of values, then it would necessarily follow that that would be a circumstance to be considered in considering whether this was an equitable sale.

THE COURT: As to whether it was possible to allocate it, is that the question? Read the question.

(Q. 31 repeated as recorded above.)

THE COURT: Of course, it can be done by ascertaining the relative value of all of these 4500 patents and then apportioning that accordingly. Whether it may be done by an accountant prior to that being done, is another question. I do not see how it is going to help us.

MR. ANDERSON: For the moment, your Honor, I shall not insist upon the question, because I will have other witnesses to take the stand. It may be that I will ask your Honor, if I find it desirable, to have the question answered.

THE COURT: You may take the answer under our general rule, if you want it.

Q. 32. Suppose you just answer that question and give your opinion on it?

A. No, it was not possible to do it fairly from an accounting standpoint.

Q. 33. In your several conferences that you said you had with Mr. Garvan in regard to this allocation or accounting of this fund, did he express any views or make any statement as to the relation, if any, between the price paid for these patents and their value?

A. Why, yes. Mr. Garvan said, or the impression I got from his words—I do not recall his exact words, of course—was that the value of the patents had nothing to do with the matter.

CROSS-EXAMINATION.

By MR. KRESEL:

XQ. 34. Mr. Brown, were all patents taken over by the Alien Property Custodian carried on the books of that office at one dollar each?

A. So far as I recall, every patent was carried at one dollar; yes, sir.

XQ. 35. And that is not confined simply to the patents that were subsequently sold to the Chemical Foundation?

A. No, sir.

XQ. 36. In other words, there were lots of other patents that the Alien Property Custodian took over and seized which, when possession was obtained thereof, were put on the Custodian's books at one dollar each?

A. Yes.

XQ. 37. As to these individual trusts, I just want to see whether I understand your testimony. I understand you to say that whenever the Custodian took over a piece of property, whatever it was, belonging to a particular enemy, there was an account opened on the books of the Alien Property Custodian under the name of that enemy and to that account the property seized was credited?

A. That is right.

XQ. 38. And if when such property was sold, the proceeds of the sale were credited to that individual account?

A. Yes.

XQ. 39. And if and when paid into the Treasury of the United States, the amount of the proceeds was debited to the Treasurer of the United States; is that correct?

A. That is true.

XQ. 40. This transaction with the Chemical Foundation which, as you have testified, was a sale of this large number of patents for a lump sum, was not the only transaction of a sale by the Alien Property Custodian of various properties made in one sale for a lump sum, was it?

A. It was not the only one. I think it was the first, but not the only one.

XQ. 41. And in the other cases where such sales were made for a lump sum, of properties belonging to various enemies, how did you treat the proceeds, the lumped proceeds that were received?

A. Of course, it depended on whether the property sold was all property of the same kind. If the property was shares of stock, for instance, there was no difficulty.

XQ. 42. Exactly, but there were cases where the property was not of the same kind.

A. In those cases we adopted a similar method, or adopted the same method that we adopted in this case.

XQ. 43. In this case was the proceeds of the sale transmitted by the Custodian to the Treasury of the United States?

A. The proceeds less certain expenses, yes.

XQ. 44. In other words, the net proceeds that were sent by the Custodian to the Treasury of the United States, according to this Plaintiff's Exhibit No. 95, was $249,775; is that correct?

A. $249,775.

XQ. 45. And in the other similar transactions where properties of various enemies and of different characters were sold for a lump sum and in one sale, did you follow the same practice and remit to the Treasury of the United States the lump sum?

A. We always remitted the lump sum to the United States, the Treasury, yes.

XQ. 46. In addition to transactions of sales of various classes of property belonging to various enemies for a lump sum, there were also transactions, were there not, where property belonging to an individual enemy, but which consisted of patents and of other property, was sold for one lump sum?

A. I would not want to say offhand. If you let me think a minute I may be able to recall.

XQ. 47. Certainly, I wish you would. May I give you an example, and perhaps that will refresh your recollection.

A. I think I recall one now.

XQ. 48. Do you?

A. I think so.

XQ. 49. What do you recall; which transaction do you recall?

A. I think it was the sale of the trademark "Pebeco."

XQ. 50. The trademark "Pebeco"?

A. I think that was the case. I would not swear to it offhand.

XQ. 51. Was that sold in connection with other property belonging to that particular name?

A. That is my recollection now, yes.

XQ. 52. Where such a sale was made for a lump sum, did you undertake when you received the lump sum to allocate a portion thereof to the patents and the balance thereof to the other property?

A. Not if it was sold for a lump sum.

XQ. 53. Certainly not. Do you remember the case of Werner-Pfleiderer Company?

A. I do.

XQ. 54. Well, apparently that recalls something interesting to your mind. If I do not state the facts correctly in my question please correct me, but as I understand the facts they were these: In that case there was a sale made of certain stock belonging to several enemies, that there was also sold together with that stock certain patents belonging to some of those enemies and belonging to other enemies, that it was all one sale for a lump sum and that it was the lump sum that was received by the Alien Property Custodian.

A. That is right.

XQ. 55. Is that correct?

A. That is true.

XQ. 56. In that case did you undertake upon the books of account of the Custodian to allocate a portion of this lump sum to the patents and a portion to the stock?

A. No, sir; I did not.

XQ. 57. You remember, do you not, the payment by the United States Government to the Alien Property Custodian of $100,000 made for past infringement

by the Government of a large number of German patents which had been seized by the Custodian?

A. I remember the payment of $100,000 from, I think, the Navy Department.

XQ. 58. The Navy Department?

A. I do not recall it was for the past infringement.

XQ. 59. Well, it referred to a large number of patents, don't you remember?

A Yes, I recall it referred to a large number of patents, but my impression was it covered more the use of the patents in the future, more than—

XQ. 60. A license, then; a license of those patents. Did you undertake to allocate that $100,000 received from the United States to these various patents; and there were about 5700 of them?

A. No, sir; I did not.

MR. ANDERSON: If your Honor please, we do not admit there were 5700 of them. If you are going to show the number or anything of that kind—

MR. KRESEL: I will do that. I will say to your Honor I shall connect that. I may be ten or fifty patents out of the way, but substantially it was 5700 patents. That is my information and I shall prove it.

MR. ANDERSON: Then I do not object to counsel's statement, if he will prove it.

XQ. 61. You took that $100,000 so received from the Government, without allocating it to each of this large number of patents, and sent it on to the Treasurer of the United States?

A. Yes, sir.

XQ. 62. Mr. Brown, in answer to Colonel Anderson's question as to whether Mr. Garvan had ever in your presence said anything with reference to the value of the patents, you said as I took it down that

Mr. Garvan said that the value of the patents had nothing to do with the matter?

A. That is my recollection—in connection with what we should do with the money, not in any other connection.

MR. KRESEL: That is all, sir.

RE-DIRECT EXAMINATION.

By MR. ANDERSON:

RDQ 63. Mr. Brown, counsel has asked you if other patents of which the Government took possession were not set up on your books on individual trusts at one dollar when the possession was taken, and you stated there were. Not when—

MR. KRESEL: He was going to say something.

A. (continued) I was going to say not when they were taken, but soon after. Sometimes it was a matter of months, because we were working under high pressure, but as soon as we could do it we set each patent up at a dollar.

RDQ. 64. What did you do when the patent was sold?

A. When the patent was sold, in case the patent was sold for one sum—one patent sold for a lump sum?

RDQ. 65. Yes.

A. In that case we credited the trust with the amount of the proceeds and charged the Secretary of the Treasury with the proceeds.

RDQ. 66. So that your accounting did not close with the possession of the patent but only when the proceeds came in and were sent to the Treasury; is that true?

A. Yes.

RDQ. 67. There was some reference made to other similar transactions. Are the two instances you men-

tioned the only two that you recall where there were lump sum sales—

A. No.

RDQ. 68. Which made an apportionment impracticable?

A. No, I think there were more; at least half a dozen.

RDQ. 69. Were those sales made while Mr. Garvan was Alien Property Custodian, as far as you can recall?

A. I think some of them were made while Mr. Palmer was there, some while Mr. Garvan was there. One of the earliest sales we had was one of that kind, as I recall, so it must have been when Mr. Palmer was there.

RDQ. 70. But some were made by Mr. Palmer and some by Mr. Garvan, and some half a dozen, you now recall, of that character?

A. Yes.

RDQ. 71. You spoke of the trade-mark "Pebeco" in reply to a question. What did that trade-mark bring, do you recall?

MR. KRESEL: What was that, please?

MR. ANDERSON: You asked him to state an instance of this kind and he stated the trade-mark "Pebeco" and the method of dealing with that fund. I want to know what that fund was—how much was it.

THE COURT: You mean whether it was more than a dollar?

MR. ANDERSON: Yes, sir.

THE COURT: You are not concerned with whether it was many times a dollar, but just simply whether it was more than a dollar?

MR. ANDERSON: I am concerned with what they did have to dispose of in dealing with that situation.

THE COURT: You may take the answer under the general objection that it is immaterial and irrelevant and furnishes no assistance in the determination of the issues of this case, nor do I think any of the evidence that is now being given is of any help whatsoever, because I see nothing to prevent the Alien Property Custodian, who had the power either by public sale or private sale to sell all the patents that remained on the day before the Treaty was signed at a lump sum, and then let it be allocated, and then the several persons in interest to be taken care of financially across the peace table or across the reparations table and across the judicial bench.

MR. ANDERSON: I see. I will argue the question on that when I come to it, if your Honor please.

THE COURT: With that understanding you may take the testimony.

MR. ANDERSON: All right.

A. Will you read the question to me, please?

RDQ. 72. What did the trade-mark bring?

A. My impression is the net proceeds of the trade-mark and some other items sold with it was a million dollars, but I do not like to guarantee that.

RDQ. 73. That all belonged to the same enemy, did it not?

A. That all belonged to the same enemy.

RDQ. 74. And a number of the other instances that you have mentioned belonged to the same enemy, did it not?

A. When I said there were six cases at least I recall half a dozen cases?

RDQ. 75. Yes.

A. No, I meant there were probably half a dozen cases where they did not belong to the same enemy.

RDQ. 76. And in cases where they belonged to the same enemy it was carried as one trust?

A. There were no difficulties there.

MR. ANDERSON: I think that is all I want to ask the witness.

MR. KRESEL: That is all, Mr. Brown.

MR. ANDERSON: The witness, with the consent of counsel, can now be discharged, if your Honor please.

MR. KRESEL: We consent.

THE COURT: The witness is excused.

MR. ANDERSON: With the usual understanding that if we need you, you will come back on request.

(Witness excused.)

MR. ANDERSON: If your Honor please, I am afraid we have confused the record a good deal today by going ahead of our regular order. I am very sorry, but now I will ask that we pursue the introduction of the documentary evidence where we left off last night; which related, as your Honor will recall, to the desire of the War Department to purchase certain of these patents, the nitrate patents.

THE COURT: You may proceed with the documentary evidence. We shall adjourn at three o'clock Standard time.

MR. GALLOWAY: The plaintiff next offers in evidence a letter dated February 12, 1919, from the Assistant Secretary of War to the Chief of Ordnance, relating to the subject of enemy-owned patents, pertaining to munitions. I think I shall summarize this rather than read it to your Honor. The letter refers to a communication.

MR. KRESEL: Mr. Galloway, may I interrupt you? I do not desire, if your Honor please, to renew my objection to each of those. I will re-

new it once this afternoon, and it may be understood that it applies to al this correpsondence that is now being offered.

THE COURT: You mean all other evidence offered by the plaintiff—unless you express the contrary view. Very well.

MR. GALLOWAY: It refers to a communication which has been addressed to the Alien Property Custodian as to the extent of enemy-owned patents relating to chemicals, and as to whether or not the United States has been protected in any sales that have been made; that it is advised by the Alien Property Custodian that it is proposed to dispose of a large number of these patents for chemical inventions, but that no sale or assignment has as yet been made and that few, if any, of the patents in which the War Department was interested, have been sold.

MR. KRESEL: May I ask the date of that letter, so I may follow you?

MR. GALLOWAY: February 12, 1919, Stipulation No. 193. The letter also directs attention to the National Defense Act which authorizes the President to purchase, by condemnation or otherwise, plants for the manufacture of nitrates and munitions, and plants for the production of nitrates useful in the manufacture of fertilizer and other useful products and it states that perhaps that would be adequate protection; and that the Custodian has also signified his willingness of adopting a general policy requiring the purchaser of patents covering inventions in which the War Department is interested to release the United States on account of past use for the future.

THE COURT: It is admitted.

Received in evidence and marked "Plaintiff's Exhibit No. 97." (*See Exhibits, Vol. I, page 285.*)

MR. GALLOWAY: Plaintiff next offers in evidence a letter dated February 16, 1919 (Stipulation No. 194), from Ramsay Hoguet to Honorable A. Mitchell Palmer. This letter is rather short and has a good deal in it that I should like to call to the Court's attention. (Reading.)

THE COURT: Admitted.

Received in evidence and marked "Plaintiff's Exhibit No. 98." (*See Exhibits, Vol. I, page 286.*)

MR. GALLOWAY: Plaintiff next offers in evidence a memorandum by Captain W. R. Swenarton, of the Nitrate Division of the Ordnance Division of the War Department, to Major Holcombe, Chief of the Patent Section, dated February 19, 1919 (Stipulation No. 237). This letter refers to a letter from Mr. Hoguet, patent counsel for the Custodian, containing a clause relating to the release of the United States from liability on account of the use of enemy-owned patents which it is probable will go into the Peace Treaty. Then it goes on and discusses that clause. I do not care to read the letter to your Honor.

THE COURT: Admitted.

Received in evidence and marked "Plaintiff's Exhibit No. 99." (*See Exhibits, Vol. I, page 288.*)

MR. GALLOWAY: Plaintiff next offers in evidence a letter dated March 7, 1919, addressed to Ramsay Hoguet, written by Spier Whitaker, assistant general counsel of the Washington Committee on Sales of the Custodian's office. This letter states: (Reading.)

THE COURT: Admitted.

Received in evidence and marked "Plaintiff's

Exhibit No. 100." (*See Exhibits, Vol. I, page 292.*)

MR. GALLOWAY: Plaintiff next offers in evidence a memorandum from Mr. Whitaker to Mr. Garvan in regard to the nitrate patents, which states that: (Reading.)

THE COURT: Admitted.

Received in evidence and marked "Plaintiff's Exhibit No. 101." (*See Exhibits, Vol. I, page 292.*)

MR. GALLOWAY: Your Honor please, the plaintiff next offers in evidence letter dated March 13, 1919, to the President of the United States, by B. Crowell, acting Secretary of War. This letter in part is as follows. I shall omit what I think is not pertinent. (Reading from letter.)

THE COURT: Admitted.

Received in evidence and marked "Plaintiff's Exhibit No. 102." (*See Exhibits, Vol. I, page 293.*)

MR. GALLOWAY: Plaintiff next offers in evidence a memorandum for the acting Chief of Ordnance, signed by B. Cromwell, Assistant Secretary of War, dated March 11, which states: (Reading.)

THE COURT: Admitted.

Received in evidence and marked "Plaintiff's Exhibit No. 103." (*See Exhibits, Vol. I, page 294.*)

MR. GALLOWAY: Plaintiff next offers in evidence a memorandum for the Secretary of War signed by Woodrow Wilson, President, dated April 8, 1919, in which he states: (Reading.)

Received in evidence and marked "Plaintiff's Exhibit No. 104." (*See Exhibits, Vol. I, page 295.*)

THE COURT: Is that the fourfold price that was referred to yesterday as being ready to be offered by the Government of the United States for certain of these patents?

MR. GALLOWAY: Yes.

THE COURT: For ten thousand dollars?

MR. GALLOWAY: Yes.

THE COURT: And not a million dollars?

MR. GALLOWAY: No; ten thousand dollars and $340,000 for investigation.

MR. KRESEL: In order, perhaps, that your Honor might be able to more clearly understand this, does it not, if you care to say so—does not this offer apply to what we call here the Haber processes?

MR. GALLOWAY: The Haber processes of some fifty-nine patents, I think.

MR. KRESEL: And those are the patents which the German witnesses said are worth $17,000,000?

MR. GALLOWAY: Yes, the same group of patents.

MR. KRESEL: And that was what the Government was offering $10,000 for, to buy them for $10,000?

MR. GALLOWAY: That is right.

MR. ANDERSON: And, to make it complete, the Chemical Foundation paid $50 apiece for five thousand of those patents.

MR. KRESEL: To make it complete—I withdraw that. I will not argue it.

THE COURT: I understand your several contentions, I think, quite fully. You may proceed with the introduction of documentary evidence.

MR. GALLOWAY: The plaintiff offers in evidence a letter, dated April 4, 1919, from Mr. Ramsay Hoguet to Mr. G. H. Dorr, Assistant Director

of Munitions, Washington, D. C. This letter states: (Reading.)

THE COURT: Admitted.

Received in evidence and marked "Plaintiff's Exhibit No. 105." (*See Exhibits, Vol. I, page 296.*)

THE COURT: We will adjourn until 8:30 o'clock, Standard Time, tomorrow morning.

(Whereupon, at 3 o'clock Standard Time, adjournment was taken until tomorrow, June 13th, 1923, at 8:30 A. M. Standard Time.)

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## EIGHTH DAY.

Wilmington, Delaware,
June 13, 1923, at 8:30 o'clock A. M.,
Standard Time.

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*Before:*

HON. HUGH M. MORRIS, U. S. District Judge.

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Counsel present as before noted.

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TRIAL RESUMED BEFORE THE COURT.

MR. MAHAFFY: With the permission of the Court, on page 1289 of the record the Government offered in evidence memoranda from the Secretary of War, signed by the President, dated April 8, 1919. It does not appear that that was formally admitted. I only wanted to have the record straight. It would be Exhibit 104. Exhibit 105 was formally admitted by the Court.

THE COURT: You have no objection to that, have you, Colonel Anderson? There is no question but what it was admitted?

MR. ANDERSON: Yes, sir.

THE COURT: Let it be so noted on the record.

MR. ANDERSON: If your Honor please, the Treaties of Versailles, St. Germain and Trianon, referred to in the Bill, were not ratified by the Senate and are therefore not laws. I think it is probable the Court would take judicial notice of them anyhow as historical documents, but in order to remove any question, and so as not to burden the record by putting those long documents into it, I have suggested to Mr. Kresel and he agrees, I understand, that it be agreed and stipulated by counsel on the record that at this trial or any re-trial, or any appeal in any Court in this cause, those three treaties or documents as printed officially by the Government of the United States or on direction of the Senate of the United States may be used and read from by either party, with the same force and effect as if they were in the record.

MR. KRESEL: It is so stipulated.

MR. GALLOWAY: If your Honor please, by stipulation the parties have agreed that a letter from the Executive Clerk of the White House may be read in evidence here, showing the absences of President Wilson in France and the times of his departure. I have that letter and ask to introduce the same in evidence, offer it in evidence, and ask that it may be read as Plaintiff's Exhibit No. 106.

THE COURT: Admitted.

MR. MAHAFFY: Mr. Galloway, have you a copy of that letter?

MR. GALLOWAY: Yes, I gave Mr. Boggs a copy.

Received in evidence and marked "Plaintiff's Exhibit No. 106." (*See Exhibits, Vol. I, page 297.*)

MR. GALLOWAY: This letter, if your Honor please is addressed to the Attorney General and is signed by Mr. Rudolph Forster, Executive Clerk. It says (Reading.)

We shall now continue with the War Department files. Plaintiff next offers in evidence a memorandum for the Patent Section of the Purchase, Storage and Traffic Division of the War Department, signed by H. W. Dix, Captain, Ordnance Department, U. S. A., concerning a conference between Mr. Dorr, Mr. Glasgow, Colonel White and Burns, Townsend and Brickenstein, and later Mr. Hoguet. I ask that the same may be read as Plaintiff's Exhibit 107.

THE COURT: Admitted.

Received in evidence and marked "Plaintiff's Exhibit No. 107." (*See Exhibits, Vol. I, page 298.*)

MR. GALLOWAY: Briefly, this memorandum states that there was a conference among the gentlemen mentioned and it states the nature of The Chemical Foundation and that its object is to take over certain patents and extend licenses to manufacturers for the processes; and it says that The Foundation Company will give to the United States at a nominal fee practically any type of license to manufacture, have manufactured, use and sell, any particular product that it may desire. (Reading further from Plaintiff's Exhibit No. 107.)

Plaintiff next offers in evidence a memorandum for Mr. Dorr from Major Holcombe concerning the transfer of enemy-owned patents relating to the production of nitrates, dated April 14, 1919, and asks that the same be read as Plaintiff's Exhibit 108.

THE COURT: Admitted.

Received in evidence and marked "Plaintiff's Exhibit No. 108." (*See Exhibits, Vol. I, page 300.*)

MR. GALLOWAY: This is from Major Holcombe and states (reading).

MR. ANDERSON: I would like to call Major Swenarton as a witness now.

## W. HASTINGS SWENARTON.

W. HASTINGS SWENARTON, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. ANDERSON:

Q. 1. Please state your name, place of residence, and occupation.

A. W. Hastings Swenarton, Montclair, New Jersey, patent lawyer.

Q. 2. State briefly your experience as a patent lawyer dealing with patent matters?

A. After graduation from Yale in the chemical course in 1900, I entered the dyestuff business as a chemist for two years. Subsequently I became an Examiner in the Patent Office, where I was assigned to the Chemical Division.

Q. 3. The Patent Office of the United States?

A. The United States Patent Office.

Q. 4. In the Chemical Division?

A. Yes, sir.

Q. 5. When did you leave there, and how long were you there?

A. I remained there three years, meanwhile studying law, and admitted to the Bar in 1905. From 1905 to date I have continuously practised patent law, specializing in chemical matters in New York City.

Q. 6. Were you connected with the War Department during the late war, and if so, state generally the time you entered the service, when you left the department, and with what branch you were connected?

A. I was a Captain in the Ordnance Department from August, 1918, until May, 1919. Up to the time of the Armistice I was assigned to the Procurement Division, where my duties involved the purchase of chemicals for explosives. Immediately following the

Armistice I was put in charge of the patent work of the Nitrate Division, another department of the Ordnance Department.

Q. 7. Did you continue in the service after you were discharged in May, 1919, for any period of time?

A. After I resigned from the service I was engaged as consulting patent counsel for about eight months for the Nitrate Division.

Q. 8. When I said "discharged" I meant discharged from the Army officially.

A. Yes.

Q. 9. Since that time you have been practicing your profession in New York, have you not?

A. I have.

Q. 10. Major Swenarton, would you state whether you had anything to do with negotiations which appear from the record to have been conducted primarily with the Alien Property Custodian and afterwards with the Chemical Foundation, in regard to securing for the War Department certain German or alien enemy-owned patents relating to nitrogen and nitrogen fixation?

A. I did.

Q. 11. Would you tell the Court so far as your own knowledge goes just about the time these negotiations were taken up, and develop what took place, within your knowledge—within your official or personal knowledge?

MR. KRESEL: Just a minute, Major. Do I understand, Colonel Anderson, you are asking the witness for certain conversations?

MR. ANDERSON: If it is a conversation, you will confine the conversation to the Alien Property Custodian or the conferences with The Chemical Foundation officials, as far as practicable.

MR. KRESEL: I beg your pardon. Apparently, the Government considers this testimony about to

come as important, and I therefore suggest that instead of this blanket question, for him to state everything, that the witness' attention be directed to some particular conversation, so that he may say with whom it was and when it was, and we may be able to check it up.

THE COURT: Time and place and persons present?

MR. KRESEL: Yes, your Honor, that is right.

MR. ANDERSON: I am perfectly willing to go through the series of questions if counsel insist or the Court thinks it is better. I am trying to shorten the examination.

MR. KRESEL: That is the only way we can check it.

MR. ANDERSON: The witness himself is a lawyer and I assume he would follow the usual procedure.

THE COURT: The only means of protection to the defendant, of course, is to have your witness designate the time, place, and persons present; otherwise the defendant will be at a loss to meet your testimony.

MR. ANDERSON: I am perfectly willing to do it, sir. I wanted to save time.

THE COURT: And the witness may do that without having you reframe the question.

Q. 12. You have heard the statement of the Court. Will you take the question as presented and state the matter which I have asked, elaborating your answer so as to comply with the suggestion of the Court?

A. May I have some of that correspondence?

Q. 13. Yes, have it all.

MR. ANDERSON: I will introduce it as he proceeds with it (handing witness papers).

A. I might preface this statement by an explana-

tion of what the Government was doing in the Nitrate Division. They had two plants—

MR. KRESEL: One minute, please. We object to that, if your Honor please. To begin with, it is not responsive to any question and, secondly, we object to it as immaterial and irrelevant at this time, as to what the Government had.

MR. ANDERSON: If your Honor please, probably I could save time by asking the question and getting a specific objection.

Q. 14. These conferences started some time in February, 1919, these conferences with the Alien Property Custodian primarily with reference to these patents, did they not?

MR. KRESEL: Does that mean conferences between this witness and the Alien Property Custodian?

MR. ANDERSON: Yes.

MR. KRESEL: You understand that to be the question, Major?

THE WITNESS: I did not hear you?

MR. KRESEL: I say, do you understand that the question is whether your conferences with the Alien Property Custodian started in February, 1919?

THE WITNESS: Yes. There was only one conference and that was with—

Q. 15. You were present at one conference with the Alien Property Custodian in relation to this matter, were you?

A. I was.

Q. 16. About what time was that?

A. It was some time prior to April first. I can give you the exact date in a minute.

MR. KRESEL: Well, Colonel, there is no question about the date. May we not agree upon it? It was February 12, 1919.

A. (Continuing) February 12, 1919.

MR. ANDERSON: There were several conferences at one or two of which Major Swenarton was not present. I just want to identify those at which he was present.

MR. KRESEL: The one you are asking him about now, at which he was present, was held on the 12th of February, 1919.

A. (Continuing) I am very sure that is it.

Q. 17. At the time of the conference on the 12th of February, 1919, did the Government of the United States own any plants for the production of nitrogen either complete or in process of construction?

MR. KRESEL: Now, Major, before you answer that, we object to that line of investigation upon the ground that it is immaterial and irrelevant. Under your Honor's rulings a large amount of correspondence has been put in evidence bearing upon the relations between the War Department and the Alien Property Custodian with reference to these German patents.

Frankly, I do not see the materiality or relevancy of that correspondence. It cannot affect the question of value. It certainly can not be used as evidence of any fraud, alleged fraud or conspiracy or monopoly. That the War Department may have had one view of what should be done with these patents and the Alien Property Custodian a different view, it seems to me is not in issue here. But the evidence has gone in. I do not think that that field should be enlarged, however.

I do not think that we are called upon here to meet any issue as to whether the Government had certain nitrate plants which it could or could not dispose of to good advantage. I do not see that we are called upon by the Bill here, which

we have to answer, to meet any such issue; and I thought it proper, for the protection of my client, to stop that inquiry if I could right at the threshold, because I can see that if your Honor will permit the Government to go into that, it will call upon us to put in evidence to offset any testimony that the Government might be able to adduce.

In so far as this testimony can be of help to the Court, in elucidating the correspondence that has already gone in, or in introducing additional correspondence along that same line, I take it that under your Honor's ruling the Government may do so. But I do say that we ought not to branch out into other inquiries of a similar nature. Therefore, we object to it as immaterial and irrelevant.

Mr. Anderson: Of course, I know all this evidence is subject to that objection, but I think probably it is due the Court, in view of Mr. Kresel's statement, that I should state what the purpose of this evidence is, so that the Court may know.

Your Honor will recall that the Answer in this case and the opening statement of counsel was to the effect that the Government of the United States had been given every advantage including free licenses for the use of these patents and that it had really been in the public interest as that interest was represented by the Government of the United States, to have these patents in this defendant.

The correspondence which we have introduced, we shall contend, taken in connection with the correspondence, which I am now introducing by this witness, to the end that it may be better applied, will show as we contend—whether it does your Honor will determine—that at the very time that this sale took place, the Government of the

United States was endeavoring to secure these nitrate patents; that the Government of the United States had two plants as to one of which it was at least deemed by the officers of the United States these patents were vital; that they had been constructed at enormous cost; that when these negotiations were going on by the Government with the Alien Property Custodian and subsequently with Mr. Garvan himself, when he became the Alien Property Custodian, these patents were transferred to the defendant and the Government knew nothing of the transfer until it was actually made, and in the meantime was taking steps to obtain and had obtained, before the transfer was actually made, the authority of the President to buy these patents at a price four times what they actually brought on the apportionment of price as indicated to The Chemical Foundation.

Therefore, in the second place, it will further appear here that they then tried to get a license from The Chemical Foundation to the end that this plant might be protected in dealing with the chemical companies who would naturally be purchasers, and that they were unable to get a license from The Chemical Foundation except a limited license, and which prohibited the use of the process except by the Government itself, or the use of the product under those patents for sale or any use except for the Government use. And that the Government could not operate these plants for its own use in time of peace, because this demand for that purpose was very nominal, while the very act under which the plants were created and constructed at an enormous cost, provided for the sale of the product for commercial

purposes; and, therefore, not only in connection with the evidence offered yesterday, that this sale was authorized, if at all, with the express understanding that the Government of the United States would have the free license as to these patents for all purposes, but also in connection with the claim of the defendant in its answer and open statement, that the Government was given this right, this evidence is directly material.

It is also material on the question of values. We are not discussing values now, but if the Government of the United States, which had a right to take these patents over and use them and did, the records show, used many patents during the war without paying anything for them, was willing to pay $10,000 to get them, and they were sold for $2500, that in itself is evidence of difference of values. All those facts bear directly upon every issue in this case, that is, this evidence, and I have stated it fully so that the Court might see its various relations, but I have not stated all of its relations, because that would require practically a re-statement of the case.

MR. KRESEL: I am certain that your Honor will not construe my silence, in not meeting the suggestion that $10,000 for the Haber patents is four times what we paid for them, as an admission of the correctness of that arithmetic.

However, we will meet that situation when it arises; but I think Colonel Anderson's statement is rather helpful to the position that we take in this matter. It certainly can not be contended that it is proper or material to this inquiry, as to whether Major Swenarton, for whose opinion I have the highest regard, thought that it was advisable that the War Department should buy

these patents, instead of having a license or whether he did not think so.

Major Swenarton was only one officer of the War Department; and I think if your Honor will pursue this inquiry with this witness, it will be made to appear that notwithstanding Major Swenarton's views, his views were overruled by his superior officer, and the contrary policy to his views was adopted.

I am only pointing that out, your Honor, as indicating that if your Honor will permit the inquiry which the Government is now seeking to make, it will of necessity enlarge the issues here being tried. It will compel the defendant to introduce, instead of the 30 or 40 documents which have now already been introduced, perhaps twice as many again; because you can not take a section of a long line of correspondence and throw it into a case with any fairness or completeness; and it is my endeavor to try to shorten this if it is possible.

Of course, if your Honor in your discretion deems that the inquiry should be pursued, we will go ahead with it, but I thought it is proper that right at the threshold it should be stopped, if possible.

I press my objection, upon the ground of immateriality and irrelevancy.

THE COURT: My momentary impression is that the evidence offered is not admissible and not relevant and not material. I fail to see how the fact either that the purchase was authorized, or the fact that the War Department deemed it expedient for the United States to take title to a group of these patents, when under the Trading with the Enemy Act the custody and control and

disposition of the patents was a matter specifically given to the Alien Property Custodian by Congress, how the views of any other department with respect to what should be done by the Alien Property Custodian or his department, can be relevant or material.

If your argument be unsound, Colonel Anderson—I do not say that it is—it seems to me that it is in this: That in making your statements in respect to the action of the Alien Property Custodian and his department, you speak of him as the Alien Property Custodian, which is correct, but then you deal with the other departments as the Government, so that it seems that therein is one flaw, probably, but the nature of this case is such, Colonel Anderson, that in the present and in the future, as in the past, I propose to let you put of record anything which you deem vital to the case unless I am perfectly convinced that in your zeal you are going far beyond bounds.

Mr. Anderson: I appreciate your Honor's statement. I did not mean to refer to one office of the Government in a different connection from another, but my reference there was to the effect that the President of The Chemical Foundation, according to the evidence, at that time was an officer of the Government.

Your Honor's ruling, however, is all I desire at this time, reserving the right to pursue that question. If I did not think it was material, I certainly would not prolong this record.

The Court: I understand your views and ordinarily, in an ordinary case, Colonel Anderson, while I should listen with much respect to views of counsel, I should not allow counsel's views to be the guide of what is admissible or what is not admissible, without repeating myself.

MR. ANDERSON: I understand.

THE COURT: Unless I am convinced that your zeal has overcome the rules of evidence, I shall permit you to put of record anything that you deem proper and, Mr. Kresel, you have the full opportunity to meet this testimony by any evidence which you may deem proper to produce.

MR. KRESEL: I think, your Honor, in this connection I should like to inquire whether your Honor would deem it an imposition on my part, if upon cross-examination of this witness I put in the balance of this correspondence.

THE COURT: No.

MR. KRESEL: And I say it may take forty or fifty documents.

THE COURT: You may identify it all, and whether you put it in now or put it in when you open your case will depend upon whether there is an objection from Colonel Anderson to its going in out of order. But you may have this witness identify all the documents that he can identify, so that you can offer them now or when the defendant opens.

Q. 18. Major Swenarton, my former question was to this effect: Whether the Government at the time of the conference in February, 1919, owned or had in process of construction plants for the manufacture of nitrogen from the air?

A. It did. It had three plants practically completed and one plant which had been abandoned. One of the plants was at Muscle Shoals, which was the largest and cost in the neighborhood of sixty million dollars. That was a plant for the production—for the fixation of nitrogen, for the production of ammonia and nitric acid by the cyanamid process, which was a process that the Government had procured under license from the Cyanamid Company of America, who

owned certain German patents known as the Frank and Caro patents. That process was purely an absorption process and not what they call a contact or catalytic process. At Sheffield, Alabama, they had another plant which was essentially what you might call a contact or catalytic process plant, whereby two gases, nitrogen and hydrogen, are brought together over a body that has the power of bringing those into chemical combination, and is commonly termed a catalyst for that reason. The so-called Haber patents are essentially contact or catalytis patents for the fixation of nitrogen and they have claims of such broad scope that it was considered advisable by the War Department to acquire—

MR. KRESEL: One minute, please. I object to permitting this witness to voice what he says was the policy—I do not recall just the word he used.

THE WITNESS: I will say the Chief of Ordnance then.

MR. KRESEL: What the policy of the War Department was. It is objectionable in one of two aspects; either he is giving us hearsay—

THE WITNESS: Oh, I have got the correspondence.

MR. KRESEL: Pardon me a minute, Major.

THE COURT: Don't interrupt.

MR. KRESEL: Please do not argue with me. Either he is giving us hearsay testimony and it is objectionable from that point, or he is voicing his own sentiment. If that be the case, if he is simply giving us his own views and will state so, then I will urge my objection on the ground it is not binding on the War Department. But for him simply to state that the War Department felt thus and so does not lead us anywhere, and I object to that general statement by this witness.

The War Department's policy is probably in writing in some way. If there is any such correspondence, I assume that under your Honor's ruling it would go in with that other correspondence. But I object to this witness interpreting the desires or the purposes of the War Department.

Q. 19. Have you the memorandum of the conference with the Alien Property Custodian of February 12, 1916?

MR. KRESEL: 1919.

MR. ANDERSON: Yes, 1919.

MR. KRESEL: I think, Colonel, that is already in evidence.

MR. GALLOWAY: It is already in the record.

MR. ANDERSON: I did not mean to interrupt you. Your Honor may have wanted to reply, but I did not want to go further with that.

MR. KRESEL: That is already in evidence.

MR. ANDERSON: It is already in evidence.

THE COURT: Is there an answer to the question to which you objected, which you wanted to strike out?

MR. KRESEL: No, your Honor, I stopped him right at the threshold.

THE WITNESS: The other plant—there was another plant at Saltville, Virginia, which was what was called a cyanide process for making ammonia that also involved certain American patents and not enemy-owned patents. Also a fourth under construction at Toledo, which was abandoned.

Q. 20. You have covered the four?

A. Yes.

MR. ANDERSON: Would you identify for me, Mr. Galloway, the exhibit at that conference of February 12th?

MR. KRESEL: I have a copy of it here. Would you like to use it, Colonel?

MR. ANDERSON: I would if you will permit me.

Q. 21. I notice in the memorandum already introduced, dated February 12, 1919, Plaintiff's Exhibit No—

MR. KRESEL: We have a list of those exhibits and I can probably tell you what that one is.

MR. ANDERSON: It is February 12.

Q. 21. (Continued) In Plaintiff's Exhibit 83, there was a statement by Mr. Palmer that the matter of the sale of the patents, nitrogen patents, to the Government was in the hands of Mr. Hoguet and he would be glad if the members present representing the War Department would take it up with Mr. Hoguet. You recall that statement?

A. I do.

Q. 22. I also note that in Plaintiff's Exhibit 85, already introduced, it appears that a conference was held with Mr. Hoguet by Major Holcombe and Lieutenant Graves, of the Ordnance Department, at 160 Broadway, New York, on April 22, 1919, at which a letter of April 16, 1919, from you to Lieutenant Graves was presented to Mr. Hoguet. Is that the letter you wrote on April 16, 1919 (handing paper to witness)?

A. It is.

MR. ANDERSON: I offer in evidence, under the stipulation, copy of a letter dated April 16, 1919, by Captain W. H. Swenarton, Nitrate Division, to Lieutenant S. H. Graves, Administration Division, Patent Section, and ask that the same be read and identified as Plaintiff's Exhibit 109.

MR. KRESEL: If your Honor please, we object to the introduction of that paper and I shall ask your Honor to be good enough to look at it, upon the ground that it is immaterial and irrelevant

and is simply a reflection of this witness's personal view and not the view of the War Department, which view, if material at all, is the only view to be considered.

Furthermore, we object to it upon the ground that upon its face, it does not refer to the patents that were transferred to this defendant. It refers to other patents as to which there was a question as to whether those should be transferred to the defendant Chemical Foundation.

Upon both of those grounds, we urge that this paper is immaterial and irrelevant and not binding upon this defendant.

THE COURT: How many persons were there connected with the War Department at that time?

MR. KRESEL: Your Honor, I have no idea, but there certainly were thousands of them.

MR. ANDERSON: If your Honor please, my reason for introducing here all of this evidence is to connect—

MR. KRESEL: Will you show that to the Court, please.

MR. ANDERSON: It all ought to go in as far as we think it is pertinent and I will not object to counsel on the other side putting in any that relates to this subject by way of a general objection. But here was a letter brought to the attention of Mr. Hoguet, who was then acting as patent counsel for The Chemical Foundation and patent counsel of the Alien Property Custodian. If this communication had been an expression merely of the views of the witness or any other subordinate officer of the War Department, the objection might apply; but it was a matter brought directly to the attention of this defendant through its patent counsel and directly to the attention of the patent counsel of the Alien Property Custodian who was

designated by the Alien Property Custodian as the person who was handling this matter, and for that reason I think it is material.

MR. KRESEL: I will assume, Colonel, that the statement you make is a fact, namely, that it was brought to the attention of Mr. Hoguet. The mere fact that the personal view of one of the officers of the War Department is disclosed to the defendant does not in any way change the situation. That is not the view of the War Department; it does not express the desire of the War Department. Why should we be called upon to follow the personal views of some particular officer of the War Department, no matter whether high or low?

If your Honor will look at the first paragraph of that paper, the one marked No. 1, your Honor will see it says: "Confirming conference with you over the telephone today as to proposed transfer of enemy-owned patents to The Chemical Foundation in addition to the forty-five hundred odd patents already acquired by it." The instrument shows on its face that it is dealing with patents that have nothing to do with the forty-five hundred patents, if that is the number transferred to The Chemical Foundation.

This witness there was giving his personal views as to what should be done in the future with regard to other patents. How is that in any way binding or material in this case?

MR. ANDERSON: I would reply simply by saying that there were twenty-one transfers in this case which continued throughout two years and it was an official act of an officer of the War Department dealing with this question, communicated to the defendant and communicated to the Alien Property Custodian. It shows the effort

on the part of the Government to obtain these patents and to deal with those patents.

THE COURT: It shows an effort on the part of whom, Colonel Anderson? I do not understand the distinction that you make between the Alien Property Custodian and the Government.

MR. ANDERSON: I make this distinction, sir, that when I speak of the Government as dealing with these patents, I speak of the officers of the War Department designated to deal with this particular subject of nitrates. When I speak of the Alien Property Custodian after the 3rd of March, I am speaking of an officer who was also the President of The Chemical Foundation. The Alien Property Custodian was an officer of the Government.

THE COURT: When were these assignments made?

MR. ANDERSON: These assignments were made on the 10th of April.

THE COURT: And this letter is the 16th of April?

MR. ANDERSON: Yes, sir. It shows the conference; and the whole history of this transaction can only be developed by this correspondence. There were subsequent assignments. Your Honor will recall that while we have talked about an assignment on the 10th of April, there will be put in in a few minutes all of them. The reason we have not put them in is that we have been stipulating certain things about them. There were twenty-one of these assignments altogether.

This correspondence which begins in February and leads up to April is by authorized officers of the War Department and was directed first to the Alien Property Custodian and then to The Chemical Foundation, first to obtain the pat-

ents, and second, to obtain a license; and neither succeeded. Now, certainly that is a very material fact in this case, in view of the statements here so often made that the Government of the United States was to be given and was given free use of these patents. We will show that they were never given any license at all as a matter of fact.

MR. KRESEL: Colonel Anderson does not really mean to say that there was no license given.

MR. ANDERSON: I mean to the War Department on these patents. The Government today, the War Department today, has no license on these Haber patents.

MR. KRESEL: Colonel, you are wrong about that. There is, and the War Department now has, and it is being recorded in the Patent Office, a full and free license to every patent that was ever conveyed to The Chemical Foundation. Now, Colonel, if you don't know it, you should know it. We have a copy of it. Mr. Galloway knows that the original instrument is in the possession of the Government. It was accepted by Mr. Roosevelt as Assistant Secretary of the Navy.

MR. ANDERSON: There has never been a license issued to the War Department covering these Haber patents.

MR. KRESEL: It is issued to the Government. It is not issued to any particular department.

MR. ANDERSON: I beg your pardon. It is issued to the Navy Department.

THE COURT: If you have a copy here, why debate it?

MR. ANDERSON: I did not intend bringing that in, sir.

MR. KRESEL: But you say no license was given when the evidence is the contrary.

THE COURT: Let us see the license.

MR. ANDERSON: I think all this matter when it goes in will be shown to be very material. I do not want to anticipate my case by arguing about the license, because we have a much larger question than that.

MR. KRESEL: But you make the statement.

THE COURT: Colonel Anderson, I want you to put every letter, every paper, every syllable, as well as every syllable of oral evidence that you have, upon this record for any purpose that you may make of it. But I do not want to be put in the position myself of admitting evidence which under any rule of evidence ever adopted by any Court would be inadmissible. Now then, so far as I now can see, there is no reason why, if this letter is admissible, the letters not only of every officer of the War Department, but by any individual or private citizen in the expression of his views as to what should be done with these patents, written to the Alien Property Custodian, should not be admitted in evidence.

I do not see that it establishes a governmental policy. I do not see that there is any policy that could be established with respect to the disposition of these patents on the part of the Government save by Congress, the President, Mr. Polk, and the Alien Property Custodian's office. Surely, the custody and disposition of these patents did not extend beyond those circles, even assuming that those persons all had power, which you deny.

MR. ANDERSON: May I reply to your Honor. Is your Honor through?

THE COURT: Yes.

MR. ANDERSON: I know your Honor does not want to put me in the position of offering evidence here which your Honor suggests is not admissible under any rule ever adopted by any Court.

THE COURT: I say, so far as I can see. I may be in error.

MR. ANDERSON: Of course, I am quite conscious of the fact that counsel in the trial of a case frequently feel that evidence is important which the Court may not feel and which in the final development of the case even counsel realize is not so important. That often happens. But I do not think that that is the case in this instance.

THE COURT: I will admit it.

Received in evidence and marked "Plaintiff's Exhibit No. 109." (*See Exhibits, Vol. I, page 302.*)

MR. KRESEL: Will your Honor permit me, as long as the question has arisen, I cannot allow, unless your Honor stops me, to go unchallenged the statement made by Colonel Anderson that we did not give the Government a license.

I hold in my hand a photostatic copy of the original license which was issued by this Foundation—not to the Navy Department, Colonel, but to the Government of the United States, which covers every Department of the Government—upon every patent that has ever been conveyed to The Chemical Foundation; and you may have it. It shows the acceptance of that instrument by the Acting Secretary of the Navy acting for the Government; and it is our information from Mr. Galloway of counsel for the Government that that instrument is actually now being recorded in the Patent Office.

How under such circumstances counsel can state here for the record that we declined to give the Government a license is beyond my comprehension.

MR. ANDERSON: I was not making the state-

ment for the record, but I must, with all deference, without arguing this license at this time, take the position—and I am going to take it in this case, and counsel may as well know it now as at any other time—that this license is not a license for the free use of these patents by the Government, without even assuming that it would give other departments than the Navy Department the right to use the patents—which I do not now propose to discuss, because that is a question to come up later—that it is not a free license to use them, but it is expressly limited to the use of the patents and the products by the Government itself and therefore makes this license absolutely inapplicable to the operation, use or sale of the product of these large plants constructed by the Government under the Act of Congress for the use of surplus for fertilizer purposes.

THE COURT: That is, it limits the Government to the use of the patents for Governmental purposes.

MR. ANDERSON: Strictly Governmental purposes.

THE COURT: And not commercial purposes.

MR. ANDERSON: And not commercial purposes. It does not allow the patents or products to be used for commercial purposes and therefore is in direct conflict, as I will contend, since we have gotten into the discussion of it, with not only the Executive order issued, but all the evidence as to what was understood up to the present time.

MR. KRESEL: I will submit at the proper time, and if your Honor desires now, I will submit a copy of the license so that your Honor may construe it.

MR. ANDERSON: Of course, the Court will con-

strue it on that point, but I want to get the record clear, if we are going to discuss it now.

THE COURT: Colonel Anderson, is it your contention that there was an agreement on the part of this defendant to give to the Government a free and unrestricted license for commercial uses as well as governmental uses?

MR. ANDERSON: I will not only contend that, but I will contend that the order issued by Mr. Polk, which I speak of as an Executive order without admitting that it is an Executive order, was predicated upon that express statement to him and that he so testified yesterday, and that was a material statement in this case; that he acted upon a mistake of fact and that his order is void even if he had authority to execute it.

I am going to contend all that and therefore all this is most practical. I am going to show that this Chemical Foundation absolutely refused to issue a general license to the Government within six weeks, after these patents were transferred. All this evidence is very material. I did not want to enlarge this discussion on the evidence so far, if I could help it. But I think I can show when I come to argue this case that this evidence is vital as going to the very meat of this case. Then I understand your Honor permits this evidence to go in. I introduce that memorandum.

To save time, I am just going to put these letters in and get along with it. I offer in evidence a letter dated April 21, 1919, by A. G. Glasgow, who appears to have been Assistant to the Secretary of War, to G. H. Dorr, Assistant Director of Munitions, with respect to the position of Mr. Hoguet with respect to the issue of these patents, and ask it be read in evidence as "Plaintiff's Exhibit No. 110."

THE COURT: Admitted.

Received in evidence and marked "Plaintiff's Exhibit No. 110." (*See Exhibits, Vol. I, page 305.*)

MR. ANDERSON: The letter is very brief, in which he states: (Reading.)

I now offer in evidence communication dated April 25, 1919, signed by A. M. Holcombe, Major, United States, office Chief of Patent Section, Purchase Branch, to Mr. G. H. Dorr, who has already been identified; to be identified and read in evidence as Plaintiff's Exhibit No. 11.

MR. BOGGS: What is the date of that letter, Colonel?

MR. ANDERSON: It is April 25, 1919.

THE COURT: Admitted.

Received in evidence and marked "Plaintiff's Exhibit No. 111." (*See Exhibits, Vol. I, page 306.*)

MR. ANDERSON: It is to Mr. Dorr from Major Holcombe, and reads: (Reading.)

I offer in evidence a communication dated August 19, 1919, addressed to the Chief of Ordnance, Washington, and unsigned, which it will be conceded, I presume was signed by D. I. McKay, initialed "D. I. M.," Vice-President of The Chemical Foundation, Inc.

MR. KRESEL: May I see it?

MR. ANDERSON: On the letterhead of The Chemical Foundation, Incorporated. Do you object to putting the signature in these?

MR. KRESEL: No, I will just verify it, Colonel.

MR. ANDERSON: Yes, and then put his signature in, so when the Court reads it, it will know who it is.

MR. KRESEL: Yes. All right, Colonel, I have

put Mr. McKay's signature there, as you suggested.

MR. ANDERSON: Yes. The letter is as follows:—

THE COURT: Admitted.

Received in evidence and marked "Plaintiff's Exhibit No. 112." (*See Exhibits, Vol. I, page 307.*)

This letter, in view of the discussion becomes important, so I shall read it. (Reading.)

MR. KRESEL: Now that your Honor has heard the letter read, I did not raise this objection, because I wanted your Honor to hear the letter read. I now move that it be stricken from the record upon the ground that it shows preliminary negotiation in a transaction which culminated in the making of an agreement between the parties in the form of the license that I have called your Honor's attention to; that it can neither vary nor assist nor aid that final agreement; that that agreement speaks for itself and is binding upon the parties, and that any previous negotiations are merged in that agreement.

MR. ANDERSON: Let me see your license.

MR. KRESEL: Yes, I will be glad to give it to you. Here it is. (Handing.)

MR. ANDERSON: In the first place, if your Honor please, it appears here that patents are bought by the Navy Department and the War Department as separate organizations.

THE COURT: It appeared what?

MR. ANDERSON: It appeared yesterday that the Navy Department paid one hundred thousand dollars for certain patent rights for the Navy Department.

THE COURT: Who is the grantee, Colonel?

MR. ANDERSON: The Alien Property Custodian.

THE COURT: I did not mean the grantee. I mean the assignee of such patents. Is the War Department a separate entity?

MR. ANDERSON: It is not a separate entity; and I am frank to say to the Court that I do not know how they handle it, but apparently they deal as separate entities for purchases of this kind, and their appropriations are entirely different, and it gets into a very complex situation, which I am frank to say I have never been able to straighten out; that if one buys under that appropriation, the other apparently does not use it; but, in any event, aside from that situation, this license, said to have been accepted by the Assistant Secretary of the Navy, and not yet in evidence, is dated the 17th day of November, 1921.

Now, there is absolutely no connection, so far as I know and so far as this record discloses, between these negotiations of the War Department for particular patents in relation to particular plants with which the Navy had nothing more to do than any other institution.

THE COURT: Unless you can show me that the license is restricted to Naval uses, I shall not recognize any distinction between the Navy and the War Departments, if it be shown in this case that the license was given to the Government for Governmental uses.

The license is not now in evidence, so your motion will have to be reserved until the license shall have been placed in evidence, if it should be placed in evidence.

I therefore suspend action upon the motion of counsel for the defendant. You may proceed, Colonel Anderson.

MR. ANDERSON: Very well, sir. I offer in evidence a report by Captain W. H. Swenarton to Major Gaillard, of the Nitrate Division, dated September 4, 1919, of the conference of August 11, 1919, with Mr. McKay, with which that letter is apparently connected, and it gives the whole story.

I will ask that it be received and read in evidence as Plaintiff's Exhibit No. 113.

THE COURT: Admitted.

Received in evidence and marked "Plaintiff's Exhibit No. 113." (*See Exhibits, Vol. I, page 309.*)

THE COURT: That is from whom to whom?

MR. ANDERSON: That is from Captain Swenarton to Major Gaillard, reporting this conference which Mr. McKay wrote about in his letter to the Chief of Office.

THE COURT: Reporting to whom?

MR. ANDERSON: Reporting to Major Gaillard, Chief of the Nitrate Division of the War Department.

THE COURT: I did not realize that. I thought that was from Captain Swenarton to somebody in The Chemical Foundation or the Alien Property Custodian's office.

MR. KRESEL: You see, your Honor, there again is an interchange of communication between two officers in the War Department. How can we be bound by that?

THE COURT: You can not. I pass upon that now.

MR. KRESEL: Or how can it be material as to what those two officers thought or said?

THE COURT: You may put it on the record, but will you call my attention, Colonel Anderson, to the rule of evidence by which that is relevant?

MR. ANDERSON: I will sir, with great pleasure. It is headed Report of Conference, and on August 11th a conference was held at the office of The Chemical Foundation, with Mr. McKay, Vice-President, Ramsay Hoguet, Patent Counsel, and Mr. Tucker, Chemist. It goes on and states he reports to his superior officer what took place at that conference with The Chemical Foundation with respect to the effort of the War Department to secure this license. That same conference is referred to in the letter of Mr. McKay which I just introduced. Therefore, a report of an officer to his superior, of a conference with the defendant's officers, about a matter affecting an issue in this case, according to our contention and in my judgment is admissible as evidence.

THE COURT: Why, Colonel?

MR. ANDERSON: Admissible as evidence of what took place at that conference. It is a contemporaneous official report of the Government, between officers of the Government. Any official report by an officer to another officer is admissible in evidence, as I understand it.

THE COURT: But here is a letter containing statement of facts, which letter was never brought to the attention of this defendant, or its contents communicated to it prior to or at the time it was written, or the time that it was received, and to some third person or party, or individual, at least, and the fact that it is a document on file in the War Department or in the Governmental records it seems to me clearly comes under the prohibition of *res inter alia acta* and can not—

MR. ANDERSON: I quite agree, if your Honor please, but what I should have done beforehand I was going to do afterwards, but I was trying to save time—to ask this witness as to this report.

I quite agree that the facts in this report might be subject to question as a correct report if there could be question of what took place, and I want the witness himself to prove what took place at that conference with Mr. Hoguet, I put this letter in evidence and I am going to have the witness testify that he wrote this report and that it is a correct report of what took place in the conference with Mr. McKay. I put it in first when I should have taken his oral evidence first.

THE COURT: There is no question about its authenticity.

MR. KRESEL: No, I am not raising that question.

MR. ANDERSON: That is the reason I put it in.

MR. KRESEL: May I say, your Honor, that Colonel Anderson is familiar with this document and so am I, but that your Honor is not. But this is not simply a report of what took place at the conference; it gives comments of this gentleman upon other people who are not concerned with this case. It criticizes other people for having taken certain positions; he draws upon his imagination as to what ought to have been done. It is not simply a report of what took place.

MR. ANDERSON: Very good. I will ask the witness to testify what took place at the conference. I was trying to get along as fast as I could by introducing these papers.

THE COURT: I said that paper was admitted.

MR. ANDERSON: Just strike it out, if your Honor please—strike the paper out.

THE COURT: You may under that ruling, as under the other ruling, make your record.

MR. ANDERSON: I would like to keep the paper on the record. I was going to identify it.

THE COURT: Very well.

MR. ANDERSON: I will withdraw my statement there and strike it out, your Honor will rule upon it yourself at my final request.

Q. 23. Major Swenarton, will you state whether you were present at a conference held about August 11, 1919, at the office of The Chemical Foundation in New York between Mr. Douglas I. McKay, vice-president; Mr. Ramsay Hoguet, patent counsel; Mr. Tucker, chemist, and yourself, with respect to the so-called nitrogen patents?

A. I was.

Q. 24. I hand you what purports to be a report from you of that conference in order to refresh your memory, and would be glad if you could state to the Court as briefly as you can what took place at the conference, confining your answer to the matters of discussion relating to the nitric patents?

MR. KRESEL: May I say that while I recognize that the conversation took place a long time, if Major Swenarton desires to refresh his recollection by any paper—

THE WITNESS: I do not need to refresh my recollection.

MR. KRESEL: (continuing) I do not raise any objection, but I would prefer that he gives his recollection unaided by any paper, if he can.

THE COURT: He says he does not need to refresh his recollection by the use of any paper, so you may take back the paper which you gave him, Colonel Anderson.

Q. 25. Give me the paper.

A. (Handing counsel). Except as to the date. Of course, I do not remember the exact date.

Q. 26. You will proceed with the answer.

A. What was the date there?

Q. 27. The date was August 11, 1919, shown by this paper?

A. The date of the conference?

Q. 28. Yes.

A. On August 11, 1919, I was sent to New York by the Ordnance Department to arrange if possible and negotiate a license—

MR. KRESEL: One minute, please. I object to that and ask that it be stricken out.

THE COURT: Sustained.

MR. KRESEL: We are not bound by any instructions that he received. He is simply asked to tell what happened at the conference.

THE COURT: Sustained on the ground mentioned, and on the further ground that it is not responsive.

THE WITNESS: Shall I start again?

THE COURT: Yes.

THE WITNESS: I went to a conference on April 11, 1919—

THE COURT: April or August?

THE WITNESS: April.

MR. KRESEL: August, isn't it?

MR. ANDERSON: August.

THE WITNESS: Yes, August. I thought he said April.

Q. 29. August 11, 1919.

A. August 11, 1919, at the New York office of The Chemical Foundation, between Mr. McKay, Mr. Hoguet and myself, with a view to—

MR. KRESEL: I object to what view he had.

THE COURT: You need not state that. Your question, Colonel Anderson, was as to what transpired at this conference?

MR. ANDERSON: I asked him to state as accurately as he could what transpired at that conference and its result.

THE WITNESS: I told Mr. McKay that both in the public press and to representatives of the War

Department The Chemical Foundation represented that if it took over these German-owned patents, particularly those in which the Nitrate Division was interested, the Government would be given a free license, and that as the Government had no department which could effectively bring suit for infringement of patents, the Chemical Foundation by its acquisition of these patents would be in a better position to protect the monopoly without in any way prejudicing the Government's position. I therefore asked Mr. McKay if he would arrange to give such free license as had been indicated in connection with the various negotiations for the acquisition of these patents from the Alien Property Custodian to the War Department. He said he thought that they could arrange such a free license, but of course that would be limited to a license for the War Department use or, as he expressed it, for munition purposes only, and that the Government could not sell fertilizer or nitrates produced at its plants in the open market. I told him that I did not think that would be at all satisfactory, as the main object of the Nitrate Act was to provide a plant not of only sufficient capacity for war purposes but for fertilizer purposes after the war ended, and that the war having ended, the Government probably had more nitrate in stock than it would use in the next ten years. He said he would take up this matter with the officials of the Foundation and would advise us later, which he did.

Q. 30. Did he express any views on the subject himself?

A. Well, he was very emphatic that—

Mr. Kresel: I object to a characterization of Mr. McKay's attitude. There can be no objection to what Mr. McKay said.

THE COURT: Sustained.

A. (continued). As I recollect it, Mr. McKay stated that if the Government desired to operate these plants and produce more product than it could consume itself, selling the surplus in the open market, it would have to be placed on the same basis as any private manufacturer, as it would not be fair to the private manufacturer to have the Government competing without paying a royalty such as was required from the private mnaufacturer, and furthermore, that even such a license would not be granted to the Government unless it was specifically stated that it was revocable at the will of the Chemical Foundation. He later wrote a letter to that same effect to the War Department.

Q. 31. You heard read the letter from Mr. McKay which I read at the bar a few moments ago, did you not?

A. I did.

Q. 32. Did that substantially state what you understand his position to be in that conference?

A. It did.

Q. 35. Was Mr. Ramsay Hoguet present at that conference?

A. He was.

Q. 34. Did he take any part in the discussion?

A. Very decidedly.

Q. 35. Can you recall what he said on the subject, if anything?

A. Not specifically, no. It was in accord with practically everything Mr. McKay said. In fact, I think it was what inspired Mr. McKay to say what he did.

MR. KRESEL: I ask that that last remark be stricken out.

THE COURT: Motion granted.

MR. ANDERSON: I want to offer one other letter, if your Honor please, and under your Honor's

indicated ruling a moment ago between officers of the War Department, and if your Honor would permit it to go in, I shall show it to counsel.

THE COURT: I shall permit it to go in but you will have to convince me of its value.

MR. ANDERSON: I will show it to counsel and show it to your Honor. I will not read it because your Honor in effect does not admit its value in evidence.

MR. KRESEL: Are you going to offer this, Colonel?

MR. ANDERSON: I will just show it to the Court, if you will allow me—or without showing it to him I just offer it and say what it is, and the Court can make its ruling.

MR. KRESEL: Colonel, the Court has already indicated its purpose.

MR. ANDERSON: Quite true.

MR. KRESEL: To admit the letter if you offer it, over my objection. Therefore, there is no necessity for any argument on it; and I assume that you want it in.

MR. ANDERSON: I do.

MR. KRESEL: It is simply subject to our objection.

MR. ANDERSON: I offer in evidence a letter dated September 9, 1919, from Mr. George J. Roberts, Special Assistant to the Chief of Ordnance, Captain S. H. Graves as Chief of the Patent Branch, Advisory Section, Administrative Division, on the subject of Chemical Foundation patents, to be identified and read as Plaintiff's Exhibit No. 114. I assume the same objection is made, and I won't read the letter because of your Honor's ruling.

Received in evidence and marked "Plaintiff's

Exhibit No. 114." (*See Exhibits, Vol. I, page 314.*)

MR. ANDERSON: I think that is all I want to ask the witness.

THE COURT: Any cross-examination, Mr. Kresel?

MR. ANDERSON: It is all I want to ask the witness on this branch of the case; I may want to call him on another branch of the case, but it is entirely disconnected with this.

MR. KRESEL: Are you through, Colonel?

MR. ANDERSON: I am through with the witness.

MR. KRESEL: I have no questions of this witness, your Honor.

(The witness excused.)

MR. ANDERSON: I am sorry to have to say, sir, that the evidence now of the Government is documentary.

THE COURT: It is no fault of yours, Colonel Anderson.

MR. GALLOWAY: If your Honor please, the plaintiff next offers in evidence the minutes of the meeting of the Advisory Committee on Sales of the Alien Property Custodian of February 14, 1919, and asks that the same may be read as Plaintiff's Exhibit No. 115.

THE COURT: It is admitted.

Received in evidence and marked "Plaintiff's Exhibit No. 115." (*See Exhibits, Vol. I, page 316.*)

MR. GALLOWAY: That is under the stipulation —No. 57. This shows that the meeting was held in New York on Friday, February 14, 1919, at 10 o'clock a. m. There were present Messrs. Otto T. Bannard, George L. Ingraham, Cleveland H. Dodge, Benjamin H. Griswold, Jr., Ralph Stone, excused; by invitation, Hon. A. Mitchell Palmer,

Alien Property Custodian, and Messrs. Francis P. Garvan, Director Bureau of Investigation; Ralph J. Baker, Assistant General Counsel; Joseph F. Guffey, Director Bureau of Sales; F. X. Anglim, Assistant Director Bureau of Sales; H. D. Green, and George P. Wagner, Secretary of the Committee. "Re Patents on Dyes and Chemicals." (Reads from Exhibit 115.)

The Plaintiff next offers in evidence copies of nineteen assignments. We are coming now to the assignments, Mr. Kresel—so that you may follow this.

Mr. Kresel: Assignments?

Mr. Galloway: The assignments. The plaintiff now offers in evidence copies of nineteen assignments exclusive of the schedules therein mentioned from Francis P. Garvan, Alien Property Custodian, to defendant, The Chemical Foundation, incorporated, which copies of said instruments are filed as Exhibits H-1 to H-19, both inclusive, with the Bill of Complaint, with the respective captions thereof, the same being of the following respective dates:

H-1, April 10th, 1919; H-2, May 2nd, 1919; H-3, May 6th, 1919; H-4, May 15th, 1919; H-5, June 17th, 1919; H-6, June 21st, 1919; H-7, October 17th, 1919; H-8, December 9th, 1919; H-9, February 26th, 1920; H-10, February 26th, 1920; H-11, March 9th, 1920; H-12, May 4th, 1920; H-13, May 15th, 1920; H-14, July 20th, 1920; H-15, December 21st, 1920; H-16, December 21st, 1920; H-17, December 21st, 1920; H-18, December 21st, 1920; H-19, February 19th, 1921.

These respective instruments purport to assign to the defendant certain patents, copyrights, trademarks and other property or rights therein mentioned and in the schedules which are thereto

annexed, and which will be next introduced. We ask that these respective instruments be not duplicated in the record, but said Exhibits H-1 to H-19 inclusive with the Bill so introduced, be identified in evidence as Plaintiff's Exhibits 116-A to 116-S inclusive.

MR. ANDERSON: I suggest that we just make it Exhibit 116, because otherwise it will confuse the schedules. The entire exhibit as 116.

MR. KRESEL: Very well.

THE COURT: We will do what Colonel Anderson suggests.

MR. ANDERSON: The next exhibit will be the schedules accompanying those assignments and it will confuse them if you mark the exhibit—

THE COURT: I wonder if it would not prevent confusion, Colonel Anderson, if we did either one of two things—that is, give each assignment a separate number and then letter the schedules alphabetically. Why not do that?

MR. GALLOWAY: I think that was the original idea, that we should have them all in one exhibit and number them—

THE COURT: No, if you give each assignment a separate exhibit number and then give the schedules to that assignment alphabetical letters.

MR. ANDERSON: The reason I suggested that is that we made quite a study of this matter the other night, and your Honor is probably right. That was our first intention, but these later assignments and the schedules which accompanied the same, being Exhibit G, which will be presently introduced, and the assignments not being in Exhibit H due to an oversight in the arrangement of the exhibits. I was a little afraid that it might confuse it, but perhaps we can work it out. The

matters attached to the Bill are quite easy of identification.

THE COURT: Yes. I believe if we give them each an exhibit number, then identify the schedules by letters of the alphabet, for instance, 116-A, 116-B, while each assignment takes a separate exhibit number, that would be better. Have you any suggestion, Mr. Kresel?

MR. KRESEL: I think any suggestion your Honor makes about that is satisfactory to us. I was going to call attention to the fact, however, that the list of assignments which Mr. Galloway just read is not a complete list.

MR. ANDERSON: No.

MR. GALLOWAY: There are two others.

MR. ANDERSON: There are three others.

MR. GALLOWAY: Yes, there are three others.

MR. KRESEL: There are two others that I know of.

MR. ANDERSON: And the final assignment of Mr. Garvan.

MR. KRESEL: There are two assignments, your Honor, which are likewise attached as exhibits to the Bill of Complaint, as Exhibit J and K.

MR. GALLOWAY: We are coming to those.

MR. ANDERSON: We are going to introduce those.

MR. KRESEL: What?

MR. ANDERSON: We are going to introduce those.

MR. KRESEL: Very well.

THE COURT: Let these assignments, then be admitted, and let them receive their respective alphabetical and numerical marks.

Received in evidence and marked "Plaintiff's Exhibits Nos. 116 to 134" inclusive.

MR. GALLOWAY: Plaintiff now offers in evi-

dence copies of nineteen schedules, filed as Exhibits G-1 to G-19 inclusive, with the Bill of Complaint, with the respective copies thereof. This however, to be subject to correction by stipulation which we have agreed upon now, except as to the signing thereof. I think they can be presented perhaps after lunch.

MR. KRESEL: That is satisfactory.

MR. GALLOWAY: I will consider that as signed then, and present it all together. I think we had better start that over again to get it right: We offer in evidence copies of the nineteen schedules filed as Exhibits G-1 to G-9, both inclusive, to the Bill of Complaint, together with the stipulation of counsel covering the same, and making corrections therein, and ask that the whole, together with said stipulation and corrections may be identified in evidence as Plaintiff's Exhibit No. 135.

Now the question comes of whether we are going to assign the alphabetical number or alphabetical designations to these exhibits, or not.

MR. ANDERSON: I would suggest now, if I may suggest, since the clerk has assigned numbers 116 to 134, that we assign individual designations—116-A, 116-B, and so on, and then additional numbers to the stipulation and to the corrections.

MR. KRESEL: Yes.

THE COURT: There is one of those schedules which accompanies each of the assignments, I assume?

MR. ANDERSON: Yes.

MR. GALLOWAY: Yes, that is true.

THE COURT: Have you arranged them in the same order as the exhibits in the Bill, as you did the assignments, so that G-1 will be 116-A?

MR. GALLOWAY: Yes. We therefore ask that G-1 be 116-A, G-2, 116-B—

MR. KRESEL: No. 117-A.

MR. ANDERSON: 117-A.

MR. GALLOWAY: No. 116-A.

THE CLERK: 117-A.

MR. KRESEL: And G-3 will be 118-A, and so on?

MR. GALLOWAY: G-1 as 116-A, G-2 as 116-B.

MR. MAHAFFY: So that the assignment and exhibit will be the number and the A.

MR. HERSHKOPF: That does not now take care of the stipulation.

MR. GALLOWAY: We will put that in, when we put the other schedules in. We ask that G-1 of the Plaintiff's Bill of Complaint be 116-A; G-2 117-A; G-3, 118-A; and so on.

MR. KRESEL: Let the Clerk fix that.

MR. GALLOWAY: And we can understand that they continue in the same order until the conclusion.

THE COURT: Yes.

MR. ANDERSON: The last number there is 134

THE CLERK: Yes, 134.

MR. ANDERSON: Then you will identify the stipulation and the correction as 135 and 136.

MR. GALLOWAY: And we ask also, in order to avoid duplication—

THE COURT: The Clerk will take care of that

THE CLERK: The stipulation is 135.

MR. GALLOWAY: We will consider that you and I signed this, Mr. Boggs?

MR. BOGGS: Yes.

Stipulation received in evidence and marked "Plaintiff's Exhibit No. 135." (*See Exhibits, Vol. I, page 330.*)

MR. GALLOWAY: The plaintiff next offers in evidence a stipulation between the solicitors for the parties plaintiff and defendant herein, con

cerning corrections in Exhibit G to the Bill of Complaint, which stipulation is as follows (reading).

The other facts are the dates of seizure and such things concerning the title of the Alien Property Custodian (further reading from Plaintiff's Exhibit 135.)

Plaintiff next offers in evidence the corrections to Exhibit G which consist of pages 1 to 55, both inclusive.

THE COURT: Are those corrections divided into nineteen classes?

MR. GALLOWAY: These corrections are taken by page number and the same appears on the Bill of Complaint.

THE COURT: Should not those be 116-B, all in one?

MR. BOGGS: Your Honor, they are not divided by exhibits. For the purpose of reference they were made by pages.

THE COURT: The correction of the schedules will be Exhibit No. 136.

Received in evidence and marked "Plaintiff's Exhibit No. 136." (Corrections embodied in Exhibit G to bill of complaint. *See Record, Vol. I, page 124.*)
Exhibit No. 136."

MR. GALLOWAY: Plaintiff next offers in evidence a letter dated November 14, 1919 from J. H. Choate, Jr. to L. H. Boggs of the Alien Property Custodian's office. It will be stipulated, will it, that Mr. Boggs was General Counsel of the Alien Property Custodian's office?

MR. HERSHKOPF: At that time, yes.

THE COURT: Admitted.

Received in evidence and marked "Plaintiff's Exhibit No. 137." (*See Exhibits, Vol. I, page 331.*)

MR. GALLOWAY: If your Honor please, we are

coming now to the Executive orders signed by President Wilson in February, 1920. This letter, dated November 14, 1919 to Mr. Boggs from Mr. Choate reads at least in part as follows. I shall omit such portions of it as I feel I can. (Reading from Plaintiff's Exhibit No. 137).

Plaintiff next offers in evidence another letter from Mr. Choate to Mr. Boggs dated November 18, 1919 and asks that the same be read as Plaintiff's Exhibit 138.

THE COURT: Admitted.

Received in evidence and marked "Plaintiff's Exhibit No. 138." (*See Exhibits, Vol. I, page 332.*)

MR. GALLOWAY: This letter being from Mr. Choate to Mr. Boggs reads as follows (reading from exhibit).

Plaintiff next offers in evidence a memorandum by Mr. Goldstein of the Custodian's office to Mr. Boggs, dated November 21, 1919, with reference to the transaction that we were just discussing now.

THE COURT: Admitted.

Received in evidence and marked "Plaintiff's Exhibit No. 139." (*See Exhibits, Vol. I, page 333.*)

MR. GALLOWAY: This memorandum states (reading).

MR. KRESEL: Mr. Galloway, have you the proposed assignment that they are talking about here?

MR. GALLOWAY: No, we do not have it, but we think the subsequent correspondence will show the portions referred to.

Plaintiff next offers in evidence a letter from Mr. Boggs to Mr. Dunbar. I think it will be stipulated that Mr. Dunbar was also in the office of the Alien Property Custodian.

MR. KRESEL: Yes, it will be so stipulated. He was Assistant General Counsel of the Alien Property Custodian's office.

MR. GALLOWAY: And Mr. Boggs was general counsel at that time?

MR. KRESEL: And Mr. Boggs was general counsel at this time.

MR. GALLOWAY: This is dated December 20, 1919.

THE COURT: Admitted.

Received in evidence and marked "Plaintiff's Exhibit No. 140." (*See Exhibits, Vol. I, page 334.*)

(By direction of the Court, a short recess was then taken at this point).

(After short recess.)

MR. GALLOWAY: I think we had made an offer.

THE COURT: It has been admitted, but you had not stated its contents.

MR. GALLOWAY: This is a letter written by Mr. Boggs while he was on the train enroute from Washington, to his assistant, stating among other things, that he had objected to the phraseology of the proposed assignment, and that Mr. Goldstein, who was familiar with the matter (reading).

MR. KRESEL: Mr. Galloway, it is apparent from what you have just read, that there is a letter from Mr. Boggs to Mr. Choate in between this last one and the one that precedes it.

MR. GALLOWAY: Yes.

MR. KRESEL: Have you that letter?

MR. GALLOWAY: No. We do not have that letter. If you have a copy of it we will be glad to put it in.

MR. KRESEL: I have not it.

MR. GALLOWAY: The plaintiff next offers a letter from Mr. Dunbar to Mr. Choate, dated De-

cember 22, 1919, and asks that the same may be read in evidence as "Plaintiff's Exhibit No. 141."

THE COURT: Admitted.

Received in evidence and marked "Plaintiff's Exhibit No. 141." (*See Exhibits, Vol. I, page 335.*)

MR. GALLOWAY: This refers to the correspondence between Mr. Boggs and Mr. Choate, and that Mr. Boggs is out of the city and that Mr. Goldstein has made a search of the records, and that there is no trace of an assignment in the files (reading).

It is suggested that the word "act" is evidently meant for "now," which we think is correct and we are quite willing to make the correction here in the record.

Plaintiff next offers in evidence a letter from Mr. Choate to Mr. Dunbar, dated December 30, 1919, with reference to this matter, which we do not care to read. It merely fills in a gap.

THE COURT: Admitted.

Received in evidence and marked "Plaintiff's Exhibit No. 142." (*See Exhibits, Vol. I, page 337.*)

MR. GALLOWAY: Plaintiff next offers in evidence a letter from Mr. Boggs, general counsel of the Alien Property Custodian's office, to Mr. Choate, dated January 7, 1920, and asks that the same may be read in evidence as Plaintiff's Exhibit 143.

THE COURT: Admitted.

Received in evidence and marked "Plaintiff's Exhibit No. 143." (*See Exhibits, Vol. I, page 338.*)

MR. GALLOWAY: This letter states (reading).

Plaintiff next offers in evidence a letter from Mr. Choate to Mr. Boggs, dated January 21, 1920,

and asks that the same may be read in evidence as Plaintiff's Exhibit 144.

THE COURT: Admitted.

Received in evidence and marked "Plaintiff's Exhibit No. 144." (*See Exhibits, Vol. I, page 340.*)

MR. GALLOWAY: This letter is in part as follows, Mr. Choate writing to Mr. Boggs, says (reading).

Plaintiff next offers in evidence a memorandum from Mr. Dunbar, who it has been admitted was Assistant General Counsel of the Alien Property Custodian, to Mr. Garvan, dated February 10, 1920.

THE COURT: Admitted.

Received in evidence and marked "Plaintiff's Exhibit No. 145." (*See Exhibits, Vol. I, page 341.*)

MR. GALLOWAY: This is as follows (reading).

Plaintiff next offers in evidence a letter from "Frank," which I think the defendant is willing to concede is Francis P. Garvan, Alien Property Custodian.

MR. KRESEL: His name is Frank. There is no doubt about that.

MR. GALLOWAY: There is a letter to Joseph P. Tumulty, by Frank, whom the defendant concedes to be Francis P. Garvan, dated February 11, 1920, and I ask that the same be read in evidence as "Plaintiff's Exhibit No. 148."

THE COURT: Admitted.

Received in evidence and marked "Plaintiff's Exhibit No. 146." (*See Exhibits, Vol. I, page 341.*)

MR. GALLOWAY: This letter is on the letterhead of the Alien Property Custodian, dated February 11, 1920, to Honorable Joseph P. Tumulty,

the White House, Washington (reading). And the notation "Who is Frank?" And the initials "W. W."

The Plaintiff next offers in evidence a letter to the President—

MR. KRESEL: Mr. Galloway, I assume that it will be conceded that this very pertinent inquiry as to "who is Frank"? is in the handwriting of President Wilson, and that the initials are his?

MR. GALLOWAY: We are quite willing to concede that, and we are also willing to put in, for the further information of the Court, the memorandum which we received from the White House, which is as follows: "Dear Governor: Frank is Francis P. Garvan, the Alien Property Custodian," signed "The Secretary W. F. J."

MR. KRESEL: And "W. F. J." stands for what?

MR. GALLOWAY: I am not informed. That is why I did not offer it.

MR. KRESEL: And the date of the memorandum?

MR. GALLOWAY: Is February 12, 1920. Is that conceded to be appended?

MR. KRESEL: Yes.

MR. GALLOWAY: I am quite willing that should go in also, your Honor.

THE COURT: As part of the last exhibit?

MR. GALLOWAY: As part of the last exhibit.

THE COURT: Give the memorandum the letter "A."

Received in evidence and marked "Plaintiff's Exhibit No. 146-A." (*See Exhibits, Vol. I, page 342.*)

MR. GALLOWAY: Plaintiff next offers in evidence a letter dated February 10, 1920, to the President, by Francis P. Garvan, Alien Property

Custodian, transmitting the Executive order which I am just leading up to, and ask that the same be read in evidence as "Plaintiff's Exhibit No. 147," from Mr. Garvan to the President.

MR. HERSHKOPF: What is the date of that memorandum?

MR. GALLOWAY: February 10, 1920.

This letter reads as follows—

THE COURT: Admitted.

Received in evidence and marked "Plaintiff's Exhibit No. 147." (*See Exhibits, Vol. I, page 342.*)

MR. GALLOWAY: This letter reads as follows (reading).

Plaintiff next offers in evidence the Executive order of February 3, 1920, as the same appears in Exhibit 5 to defendant's answer and asks that the same be Plaintiff's Exhibit 148 and that it be not duplicated in the record.

THE COURT: Admitted.

Received in evidence and marked "Plaintiff's Exhibit No. 148." (Same as Exhibit No. 5 to answer. *See Record Vol. I, page 557.*)

MR. GALLOWAY: Plaintiff next offers a letter from J. P. Tumulty, Secretary to the President, to Mr. Francis P. Garvan, Alien Property Custodian, dated February 13, 1920, and asks that the same may be read as Plaintiff's Exhibit No. 149.

THE COURT: Admitted.

Received in evidence and marked "Plaintiff's Exhibit No. 149." (*See Exhibits, Vol. I, page 343.*)

MR. GALLOWAY: This letter, if your Honor please, says (reading).

THE COURT: What is the evidential value of that letter?

MR. GALLOWAY: If your Honor please, we are

going to raise the question, and I think it has already been raised, that this is not an attempt by the President to confirm the prior sales of patents and that the correspondence, both leading up to and at the time of the execution of this instrument, shows that it was not so intended by the President and it was not so presented to him; and in fact that the wording of the Executive order itself bears out that contention.

THE COURT: And that the letter of transmittal by the Secretary of the President of the United States is to be considered in the judicial construction of that document?

MR. GALLOWAY: In the event that there may be any ambiguity contended for by either party.

THE COURT: I shall not so hold, but you may put it in the record.

MR. GALLOWAY: Plaintiff next offers in evidence the minutes of the meeting of the Advisory Committee on Sales of the Alien Property Custodian of Friday, March 28, 1919, and asks that the same may be considered as Plaintiff's Exhibit No. 150.

THE COURT: Admitted.

Received in evidence and marked "Plaintiff's Exhibit No. 150." (*See Exhibits, Vol. I, page 344.*)

MR. GALLOWAY: We wish to call the Court's attention only to the portion relating to the Chemical Foundation, Incorporated.

MR. KRESEL: Do the minutes show who was present at the meeting?

MR. GALLOWAY: We shall call that to the Court's attention. The minutes show a meeting of the Advisory Committee on Sales held at the New York office of the Alien Property Custodian on March 28, 1919. Present: Messrs. George L.

Ingraham, presiding; Ralph Stone; Benjamin H. Griswold, Jr.; Cleveland H. Dodge; Otto T. Bannard, excused; by invitation: Messrs. Joseph F. Guffey, Director, Bureau of Sales; F. X. Anglim, Assistant Director; Spier Whitaker, Assistant General Counsel; and George P. Wagner.

The minutes relating to the Chemical Foundation are as follows (reading).

Mr. Kresel, are you prepared to stipulate that these are the only two minutes of the Advisory Committee?

MR. KRESEL: The Government asks the defendant to stipulate that the two extracts from the minutes of the Advisory Sales Committee just put in are the only extracts in the minutes of that Committee that refer to The Chemical Foundation. I state that in so far as I know now, that is a correct statement and I am perfectly willing to concede it, subject to correction. If we find other mention thereof, I desire the privilege of correcting it.

MR. GALLOWAY: If any other such minutes are found by either party, they will be submitted in evidence here. Otherwise, it is admitted and stipulated that these are the only ones.

MR. KRESEL: Subject to correction, we are willing to so stipulate.

MR. GALLOWAY: Plaintiff next offers in evidence the minutes of a conference with Mr. Ramsay Hoguet in regard to The Chemical Foundation by the Federal Trade Commission held in Washington, June 10, 1919, and asks that the same may be read as Plaintiff's Exhibit No. 151.

MR. KRESEL: May I inquire as to the theory upon which that is being offered? This is June, 1919, subsequent to all the orders by Mr. Polk,

subsequent to the original assignment. I should like to know what the purpose of that is.

MR. ANDERSON: There are a number of purposes, if your Honor please. There are a great number of these patents that are licensed by the Federal Trade Commission. Some of them were sold at that time. There were various assignments made at various times and this conference related to the dealing with the patents by the Chemical Foundation and the Federal Trade Commission, and especially with regard to the licensing thereof. It relates to a number of issues in this case and therefore we feel a very important document, as it was a conference between the Federal Trade Commission and the gentlemen who were recognized as the chief active representatives of The Chemical Foundation.

MR. KRESEL: Now Colonel, in order that the Court may understand what that document is and make an intelligent ruling, I think you will agree with me that that was a conference at which there was a discussion between the Federal Trade Commission and Mr. Hoguet upon the proposition of the two departments co-operating to induce holders of licenses from the Federal Trade Commission to surrender such licenses and take out licenses from the Chemical Foundation. I think that is the substance of everything that went on there. I claim that that is absolutely immaterial and irrelevant. It can have no bearing upon the issues in this case. It does not even reflect what was referred to here as the attitude of the Federal Trade Commission.

THE COURT: It does not show fraud or conspiracy.

MR. KRESEL: Fraud or conspiracy or monopoly. It is subsequent to the event.

MR. ANDERSON: On the contrary, if your Honor please, a greater part of this evidence would be admissible as admissions by the chief representatives of this corporation as against the position taken in the answer and against the position taken in the opening statement. If no other reason existed for it, the admissions of Mr. Hoguet are clearly binding upon this corporation, in the first place, as to the transactions which preceded and what their purpose was. In the second place, it deals with the question of licensing and royalties, which is one of the many questions which will come up, as your Honor observed —we have taken a different position on the law in regard to that—and much of this relates to that subject. A good deal of it is admission which would be admitted on that ground, if on no other.

THE COURT: Admissions with respect to what particular thing?

MR. ANDERSON: Without going over the paper—I could not state the exact language——

THE COURT: I do not want you to do that.

MR. ANDERSON: But admissions first as to the nature of the Chemical Foundation and its objects; admissions, second, as to the rights of The Chemical Foundation to license fees; claims of The Chemical Foundation as to license fees made by its representative authorities. All of those matters are clearly admissible in evidence in a case of this kind and they bear both upon the question of the rights of the parties in this case and our general charge of conspiracy and of scheme to get control of these patents.

We are going to contend in that connection that it was done without the knowledge of the Federal Trade Commission; that it was never intended even by Mr. Polk, and we think the record

will bear us out; that the patents licensed by the Federal Trade Commission never came within the alleged authority given to sell them; that it was an invalid sale as to them; that they did not come within the authority.

THE COURT: Invalid sale of what?

MR. ANDERSON: Of the patents licensed by the Federal Trade Commission.

THE COURT: That is, that any patents which had been licensed could not be sold?

MR. ANDERSON: Exactly. We will contend that and we think the record and the documents will bear that out.

THE COURT: Will this document bear on that?

MR. ANDERSON: Very much on that point. It also helps as showing—here is a complete statement contemporaneous with this event covering the situation by one of the leading representatives of this organization and its patent counsel who dealt with this particular feature of it and also who was patent counsel of the Alien Property Custodian.

Even if it were a conspiracy case in one aspect, even if it did not have the broad issues involved here, nearly all of it would be admissible as admissions, and if we were willing to put it all in, to make the statement complete, it would all be admissible on that ground if for no other cause because I think the law is well settled that admissions of officers of corporations in dealing with the present position of that corporation, either in pleadings or upon statements, are admissible as to subsequent events.

THE COURT: Colonel Anderson, did you not raise an objection one day last week, to some question—your objection was that it had not been shown that this officer had been authorized?

MR. ANDERSON: There might be such a limi

tation, and there is such a limitation, but I think the evidence here is abundant to show that every matter that came up in regard to these matters was referred to Mr. Hoguet by Mr. Palmer, and a number of letters were put in by Mr. Palmer saying he would deal with it, and he appears there as representative of The Chemical Foundation to deal with these matters before the Federal Trade Commission.

The minutes of The Chemical Foundation show he was elected or appointed as patent counsel.

THE COURT: You need not argue that. I will be very glad to hear you if you want to discuss it, but it seems to me we have gone further and further afield, and that the issues in this case can not be determined by this. The question which you say bears upon it must be determined upon other evidence which it is unnecessary for me to discuss at this time, as I see it.

Before I rule, I will hear you, Mr. Kresel.

MR. ANDERSON: May I just say one thing more, sir, before he replies.

MR. KRESEL: Certainly.

MR. ANDERSON: I quite appreciate your Honor's position, and that your Honor feels that this is largely a question of law in this case upon practically undisputed facts. I am frank to say that I think many of the controlling questions, many of the very essential, if not the controlling questions, could have been determined on the Pleadings. Therefore I asked your Honor to hear argument on the Pleadings in advance. I took that position from the first.

MR. KRESEL: I now understand that the offer is made upon the theory that it contains admissions made by an officer of the defendant.

MR. ANDERSON: That is one theory, not the only theory.

MR. KRESEL: Now, as to that theory, assuming now that Mr. Hoguet was authorized to bind the corporation by these admissions, then the only portion of that instrument that is admissible upon that theory, are the admissions made by Mr. Hoguet.

If your Honor will look at the instrument, you will see that it contains a running fire of questions and answers between the members of the Federal Trade Commission on one hand and Mr. Hoguet on the other. Certainly, no statements made by the Federal Trade Commission are admissions binding on us; so that upon that theory, the only thing that is admissible is what Mr. Hoguet said.

I understand the Government is offering the whole instrument, is not confining its offer to Mr. Hoguet's statement; that is one point.

Now, as to the claim made by the Government that there was no power in the Alien Property Custodian to make a sale of a patent upon which the Federal Trade Commission had issued a license——

THE COURT: You need not discuss that now. That is a clear question of law, unless you think you want to put of record your position on it now.

MR. KRESEL: I should like to say that the Statute itself is so plain upon the proposition that I think if Colonel Anderson will give the question more mature consideration, he will come to the conclusion that he is in error about that.

Moreover, as we pointed out, I think, yesterday, if your Honor please, the order of President Wilson, dated December 3, 1918, clearly defined the powers and duties with respect to these pat-

ents as between the Alien Property Custodian on one hand and the Federal Trade Commission on the other; and if your Honor will take the trouble to look at that, you will see that that Executive Order expressly provides that the Federal Trade Commission shall issue no license upon any patent without first giving the Alien Property Custodian notice thereof. That the Alien Property Custodian was to have fifteen days within which to make seizure, if he so desired, and further provided that in so far as the Alien Property Custodian is concerned, his duties were in no way limited by any Federal Trade Commission license that had been issued. All that the Order says was in the last paragraph thereof.

As a historical fact, I think it is interesting for me to say to your Honor that that paragraph is written in President Wilson's own handwriting, wherein he provides that that Executive Order shall not in any way affect any licenses that had theretofore been issued by the Federal Trade Commission. But that can not be made the basis of an argument that thereby the power granted by Congress to the Alien Property Custodian to seize and sell was in any way interfered with.

However, I think that question is not involved in the present objection that I have urged to this instrument. Our objection is that it is immaterial, irrelevant, and not binding upon this defendant.

MR. ANDERSON: I wanted to make this additional statement, that I did not, by stating the grounds I did state, intend to limit myself to those grounds.

THE COURT: You intend to make use in this Court and in the Appellate Court of anything that you have in the record that you can make use of?

MR. ANDERSON: Yes, sir, and I think it is pertinent and relevant evidence. If there is any part of it that is not pertinent, the Court will determine when it comes to consider it.

THE COURT: Are you going to read it in?

MR. ANDERSON: No, sir.

THE COURT: It is admitted.

Received in evidence and marked "Plaintiff's Exhibit No. 151." (*See Exhibits, Vol. I, page 351.*)

THE COURT: You may call my attention to such pertinent portions of it, Mr. Galloway.

MR. GALLOWAY: I understand. I do not think that we want to read it in. I do not think we want to read any of the exhibit which has just been admitted except to say that it is a conference between Mr. Hoguet and the Federal Trade Commission, in which Mr. Hoguet is contending for the right of the licensees to surrender their Federal Trade Commission licenses and the same to be accepted, the surrender to be accepted, so that The Chemical Foundation may get first hand the royalties payable under the licenses. I merely make that statement in order to connect up with the thing which I intend to show.

THE COURT: Now, in your briefs, you may, in briefing the facts, refer again to such portions of any of your documentary evidence as you believe to be pertinent upon the issues of fact, if there are any.

MR. GALLOWAY: Plaintiff next offers in evidence a letter from Mr. Ramsay Hoguet to Honorable A. Mitchell Palmer, Attorney General, dated July 28th, 1919, referring to the bringing of suits, to collect these very royalties referred to, and asks that the same may be read in evidence as "Plaintiff's Exhibit No. 152."

Received in evidence and marked "Plaintiff's

Exhibit No. 152." (*See Exhibits, Vol. I, page 372.*)

MR. GALLOWAY: This letter is to Honorable A. Mitchell Palmer, Attorney General, June 28, 1919. (Reads Plaintiff's Exhibit 152.)

We next offer in evidence two memoranda on the letter-head of the Private Secretary of the Attorney General, and a notation thereon by Mr. LeRue Brown with reference to this letter, which is preliminary to the answer to the letter which we just read.

THE COURT: It is admitted.

Received in evidence and marked "Plaintiff's Exhibit No. 153." (*See Exhibits, Vol. I, page 374.*)

MR. GALLOWAY: This is from R. T. Scott, to Mr. Brown, dated July 3rd (reads from Exhibit No. 153). A notation following that, addressed to Mr. Whitaker and initialed "L. B.," who it later appears was LeRue Brown, Assistant Attorney General. (Continues reading exhibit.)

The plaintiff next offers in evidence a letter signed by LeRue Brown, Assistant Attorney General, to Mr. Ramsay Hoguet, dated July 8, 1919.

THE COURT: Admitted.

MR. GALLOWAY: I ask that the same may be read in evidence as Plaintiff's Exhibit No. 154.

Received in evidence and marked "Plaintiff's Exhibit No. 154." (*See Exhibits, Vol. I, page 374.*)

MR. GALLOWAY: It is addressed to Mr. Ramsay Hoguet, 149 Broadway, in re Chemical Foundation, Incorporated, and signed by LeRue Brown, Assistant Attorney General. (Reads Plaintiff's Exhibit No. 154.)

MR. KRESEL: Now may I have those last three exhibits. I have a motion to direct to the Court with respect thereto. Your Honor will notice that

I raised no objection to these last three exhibits, because I did not want the defendant's position to be misconstrued with respect thereto, more especially in that the first letter was written by Mr. Hoguet, who is an officer of this Court and who I think is entitled to the protection of the Court.

We now move to strike out those three letters upon the ground that they are immaterial and irrelevant, that the only purpose for which they could be put in here would be to cast a reflection upon Mr. Hoguet, for the purpose of construing that he was making an improper suggestion to the Attorney General of the United States as to how a litigation was to be conducted. It does not bear upon the conspiracy charge, because it is not charged that the Chemical Foundation or Mr. Hoguet or the Attorney General of the United States was in the conspiracy. The letters show that the litigations were put into the hands of Mr. Spier Whitaker, who now sits as counsel for the plaintiff in this litigation, and nobody will say that Mr. Whitaker allowed a litigation to be conducted for or against the Government in any but the proper way.

I call upon the Government now to justify the putting in of those three documents. I want to know what the purpose was, if it was not to cast a slur upon Mr. Hoguet.

Mr. Anderson: Your Honor please, I am in entire sympathy with the views of counsel as to the desirability and the propriety of avoiding as far as possible drawing members of the Bar and any member of the Bar of the United States into litigation. I want to express my regret for Mr. Hoguet, and my regret that in this case it has been necessary for us to put in a great deal of correspondence of members of the Bar. But at least members of the Bar acting in a business matter

are outside the rule of privileged communications between client and attorney and are like other citizens subject to have their acts reviewed, and if it is done with due respect for their position it should be done as fearlessly with respect to them as with respect to any party to a litigation. In this matter the charge has been made that the purpose was to secure these patents and to protect their title to these patents, by the dye industry, and I think, and I shall certainly argue, that The Chemical Foundation is nothing more nor less than an agency of the dye industry.

THE COURT: I should be glad, Colonel Anderson, if at some time you will tell me what you mean by dye industry. It has been used by you and possibly by other counsel, but I recall one or two of your statements and I do not at the instant recall one by Mr. Kresel. I want to know whether you are speaking in the abstract, of those engaged in the industry. I am not criticizing you at all, but I have had that inquiry in mind.

MR. ANDERSON: I will answer your Honor's inquiry. I think it is a very natural one because it confused me a great deal when I took this case up. It begins in The Chemical Foundation's charter itself and the use of the expression probably comes from there—the Americanization of the chemical and dye industry. That has been spoken of here a great many times, that the dye industry comprised the people who were financing or underwriting this scheme. I would say that the full extent that that term could be applied in this case would be to those who appeared according to the record to be stockholders and members of this corporation and members of the American Dyes Institute and its immediate affiliated organizations referred to in the Bill or proved to have been connected with them in con-

nection with these transactions. That in itself is, of course, a broad designation, but it is about the best I can make without calling any names. In any event, this corporation, which was merely the agency used for the purposes of that industry—whether legitimate or otherwise I am not saying—was represented in this matter by the distinguished gentleman to whom reference has been made. If it appears that acting on their behalf as their counsel he suggested a friendly litigation for the purpose of settling their title or their rights in any respect to the property under review in connection with this particular matter, he may not have had any improper motives in so doing, but it is one of the facts tending to show the purpose as charged in the Bill and the consummation of that purpose. Therefore, while it is with the deepest regret that correspondence of this kind should be presented and necessarily should come from a lawyer, I do not by introducing this correspondence mean to reflect upon Mr. Hoguet personally or professionally. I introduce this correspondence more as affecting the rights of his client. We are not trying a case of that kind. I think the correspondence is very pertinent in that connection and it is necessary that the Government should put it in, otherwise I certainly would not have put it in. I hesitated a long time for the very reason that Mr. Kresel has indicated, but it seemed to me that it was my duty representing the Government to put that in. It is certainly not intended as reflecting on Mr. Hoguet, but as affecting his client's interests. We are not concerned particularly with Mr. Hoguet in offering this.

Mr. Kresel: I do not know, your Honor, that we are any more informed as to the purposes of the Government now than we were when I put

my question. It cannot be, your Honor—it cannot be—that this correspondence sheds any light or can give the Court any help in determining whether there is a monopoly here or a conspiracy to monopolize, or a conspiracy to get this property for The Chemical Foundation. Here is a lawyer who writes to the Attorney General of the United States and says, Here is a section of the Trading with the Enemy Act that we want to test in the courts and we want it done in a friendly way. The Attorney General comes back and says, Yes, we will do it in a friendly way but at arm's length. How can that correspondence have a bearing in any way upon the conspiracy or the monopoly or the attempt to get this property? I say it is open to the construction that Mr. Hoguet did something which was not proper. Mr. Hoguet would have to stand the consequences of his acts if the testimony were otherwise material and relevant, but I say here this testimony is not material and is not relevant, and that the Court ought not to permit it to remain upon its records.

THE COURT: As I understand you, Colonel Anderson, the only purpose of that is as indicating one act of an officer of this defendant corporation which possibly might be open to a construction that he was thereby acting in such manner as would permit his act to be interpreted as one in the carrying out of the alleged conspiracy or fraud alleged in your bill.

MR. ANDERSON: The action on the part of the corporation itself adopting the proceeding up to that time. But certainly I have not suggested that Mr. Hoguet intended anything improper. He thought it was in the interests of his client to do this thing, I assume, and Mr. Kresel has made that suggestion, I have not made it.

THE COURT: No, but as I understand Mr. Kresel's position, it is that these documents bear no such interpretation, but the mere fact that you put them in in a case where conspiracy and fraud are involved, places that interpretation upon them.

MR. ANDERSON: They are put in as affecting The Chemical Foundation's rights in that regard and as in no way intended as a reflection upon Mr. Hoguet, professionally or personally. That is not my purpose.

THE COURT: As far as the documents themselves are concerned, which I have now heard read, I should determine, if I were not opening the record to all evidence, which counsel assures me in good faith he believes should constitute a part of the record—I should be prepared to say that the suggestion made by Mr. Hoguet is nothing more, as I interpret it, than a suggestion that there be a case stated, if possible, the meaning of which is known to all lawyers; that is, frequently the facts are agreed upon and only an issue of law is presented to the Court.

I assume, so far as I now know, that these papers are not open to any other interpretation or construction. I find no internal evidence to suggest or indicate that Mr. Hoguet in making the suggestion to the Attorney General was proposing to him something in the nature of a fraud. I shall let them stay of record only because counsel says that it indicates a possible intent or purpose to maintain the position which The Chemical Foundation had theretofore shown with respect to these patents and not at all for the purpose of indicating any reflection upon Mr. Hoguet personally.

MR. KRESEL: I thank your Honor for your statement with reference to Mr. Hoguet. I do it voluntarily. He is not my client, but he is an of-

ficer of the Court, and I think he is entitled to such protection as the Court can give him.

MR. ANDERSON: I hope that counsel does not mean to imply by that that I have said anything that requires protection.

MR. KRESEL: No, no; but your actions sometimes speak as loud as your words.

THE COURT: I think that that matter is ended.

MR. ANDERSON: My words were not intended to make that reflection upon Mr. Hoguet. What they speak I stand by.

MR. GALLOWAY: If the Court please, the plaintiff next offers in evidence an assignment by Francis P. Garvan as Alien Property Custodian to the defendant, The Chemical Foundation, dated March 1st, 1921, and asks that the same be considered as read in evidence as "Plaintiff's Exhibit No. 155," as the same now appears as Exhibit I in the Bill of Complaint and that it be not duplicated in the record.

THE COURT: So admitted.

Received in evidence and marked "Plaintiff's Exhibit No. 155." (Same as Exhibit I to bill of complaint. *See Record, Vol. I, page 472.*)

MR. GALLOWAY: Plaintiff next offers in evidence an assignment by Thomas W. Miller, Alien Property Custodian, to the defendant, The Chemical Foundation, Incorporated, dated April 27th, 1921, and asks that the same be received in evidence as Plaintiff's Exhibit No. 156, as it now appears in Exhibit J to the Bill of Complaint and that it be not duplicated in the record.

THE COURT: Admitted.

Received in evidence and marked "Plaintiff's Exhibit No. 156." (Same as Exhibit J to bill of complaint. *See Record, Vol. I, page 480.*)

MR. GALLOWAY: Plaintiff next offers in evidence an assignment by Thomas W. Miller, Alien

Property Custodian, dated November 5th, 1921, to the defendant, The Chemical Foundation, Incorporated, as the same appears in Exhibit K to the Bill of Complaint and asks that the same be read in evidence as "Plaintiff's Exhibit No. 157," but that it be not duplicated in the record.

THE COURT: Admitted.

Received in evidence and marked "Plaintiff's Exhibit No. 157." (Same as Exhibit K to bill of complaint. *See Record, Vol. I, page 485.*)

THE COURT: Are these assignments for additional patent rights, or do they pertain to patents theretofore assigned?

MR. GALLOWAY: The assignment by Mr. Garvan was the attempted confirmatory assignment of all prior assignments. The first assignment by Colonel Miller was an assignment of rights not theretofore covered by any of the prior assignments. The second assignment by Colonel Miller covered only rights which had theretofore been attempted to be conveyed to The Chemical Foundation, Incorporated.

THE COURT: Was it a blanket assignment?

MR. GALLOWAY: No, it had a schedule attached.

MR. ANDERSON: You have not introduced the second yet.

MR. GALLOWAY: Yes, we have introduced the second, but we have not introduced the schedule as yet.

MR. KRESEL: You are going to put in the schedules now?

MR. GALLOWAY: Yes, that is what I am finding right now, Mr. Kresel. Plaintiff introduces or offers in evidence, and asks that the same be considered as read in evidence, as the same appears in Schedule 20 of Exhibit G of the Bill of Complaint on page 390 thereof, the schedule attached

to the assignment of April 27th, 1921, which has been admitted in evidence heretofore as Plaintiff's Exhibit 156.

THE COURT: Then this schedule will take the marking of 156-A.

Received in evidence and marked "Plaintiff's Exhibit No. 156-A." (Same as Schedule 20 of Exhibit G to bill of complaint. *See Record, Vol. I, page 390.*)

MR. GALLOWAY: Plaintiff next offers in evidence Schedule 21 of Exhibit G of the Bill of Complaint as the same appears in the Bill of Complaint on page 391, and asks that the same may be read in evidence as Plaintiff's Exhibit 157-A, as the schedule attached to Exhibit 157 heretofore introduced.

THE COURT: So admitted.

Received in evidence and marked "Plaintiff's Exhibit 157-A." (Same as Schedule 21 of Exhibit G to bill of complaint. *See Record, Vol. I, page 391.*)

MR. KRESEL: Mr. Galloway, will you permit me?

MR. GALLOWAY: Surely.

MR. KRESEL: The Court asked a question as to the extent of these two assignments made by Colonel Miller. As to Exhibit K, that is, the assignment of November, 1921, if your Honor will permit me to state, that was an assignment made by Colonel Miller, wherein after reciting all the prior assignments made to The Chemical Foundation, he says that "I, Thomas W. Miller, as Alien Property Custodian, have determined that it is proper, to fully carry out the objects, intention and purposes of said assignment and to perfect the title of said Chemical Foundation to the said trade-marks and registrations thereof," and so on, "with the good will," and then he says that

he "determines that these are matters that refer to The Chemical Foundation," and then he goes on and in the broadest language possible confirms said assignments and says that he made demands himself for some of these things. So that, as I intimated in my opening statement, your Honor, it will be the claim of the defendant——

MR. GALLOWAY: I do not see that we are called upon to argue these things at this time and the legal conclusions to be drawn therefrom, because there will be other evidence that will follow later upon these assignments.

MR. KRESEL: That is quite true. I am not arguing the case now. I thought that the Court did not get very clearly the answer to its question.

MR. ANDERSON: If your Honor please, the usual time for luncheon has arrived.

THE COURT: Is it convenient for you to stop now?

MR. ANDERSON: Yes, sir. May I ask, with the consent of counsel, that the Court adjourn until tomorrow morning. There are a number of figures and accounts showing the income, and so forth, and other matters. We have been trying to stipulate as much as we could as we went on, but we have not been able to get together. Both parties have their accountants here and I wanted to put them in this afternoon, but I do not think we can get ready within the luncheon hour to do it. So I wanted to suggest that we adjourn, if it is agreeable to the Court, until tomorrow morning, so we can get all these unsettled matters in shape that we have between us, as far as we can, and then go on quickly with it tomorrow morning. Would that be agreeable to the Court?

MR. KRESEL: I have no objection at all, of course, to anything that is for the convenience of the Government.

MR. ANDERSON: If your Honor does not desire that, we can go ahead with other matters.

THE COURT: No, I fully appreciate that counsel can proceed sometimes more rapidly out of Court than in Court. I think you could make more headway by taking the time this afternoon to get your evidence in shape. You have other evidence besides documentary evidence, I assume.

MR. ANDERSON: Very little more oral testimony, and I want to go over that and see how far we can stipulate, which to some extent will affect the documentary evidence that we will put in.

THE COURT: Can you indicate to me probably how much longer time you will need to put in your case?

MR. ANDERSON: I expect to rest for the Government, or substantially complete the case in any event by Friday. I was going to say that to counsel.

THE COURT: That is Friday of this week?

MR. ANDERSON: Of this week. I may ask that I be permitted to defer formally resting until I have over the week-end to check this enormous amount of stuff that we have selected from and see whether I have covered all that we want to put in.

MR. KRESEL: That is quite agreeable.

MR. ANDERSON: But I can say that substantially I think this case will be in by Friday evening's adjournment.

THE COURT: Can you indicate at this time the probable length of time that you will require, Mr. Kresel?

MR. KRESEL: I am in hopes, your Honor, that we will take no time. I am in hopes that we can convince your Honor that the defendant should not be put to its defense. However, in the event that your Honor should hold the contrary, my es-

timate is that it will take us ten Court days in which to put in our defense.

THE COURT: With respect to your motion in which you expect to raise the question of the sufficiency of the evidence to support the allegations of the Bill or to warrant a decree, that you mean in the nature of a non-suit or something of that sort?

MR. KRESEL: Yes, your Honor. It had been our plan, I may say, that after the Government rests, especially if the Government rests on Friday, that that will give us three days—as I understand your Honor will not hold Court for this matter on Monday—to get a fair view of what is in and then come prepared here on Tuesday to present to your Honor a motion to dismiss.

THE COURT: Does a motion in the nature of a motion for non-suit lie in equity until you have also rested? I will not go into that now, but I will take that under consideration.

MR. ANDERSON: My reason for stating what I have is; I think I can get through by Friday to give counsel three days; but certainly we would not take over half a day on Tuesday, I am sure. That will be just to connect up things and get the record complete.

MR. KRESEL: We shall be prepared to go on Tuesday with our case, if your Honor shall hold that we are to go on; so that there will be no delay on our part.

MR. ANDERSON: Then we will proceed tomorrow morning and we will have everything in shape.

THE COURT: Tomorrow morning at 8.30 Standard time.

(Whereupon at 11.45 A. M., adjournment was taken until Thursday, June 14th, 1923, at 8.30 o'clock A. M., Standard time.)